

(6)
No. 86-337

Supreme Court, U.S.
FILED

DEC 12 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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December 12, 1986

PETITION FOR CERTIORARI FILED AUGUST 30, 1986
CERTIORARI GRANTED OCTOBER 20, 1986

122992

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(11) Complaint for Injunctive and Declaratory Relief (March 3, 1983)	Pet. App. 23a

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

 No. 85-1657

 BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff-Appellant,

v.

 OKLAHOMA TAX COMMISSION, *et al.*,
Defendants-Appellees.

DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
5/6/85	CS.DKT Case docketed
10/21/85	BR.F Appellant's brief filed, orig +9cc,c/s ROA.DSGN.F Appellant's designation of the record on appeal filed, orig
11/7/85	M.BC.PARTY.F Motion of Assoc. of American Railroads for leave to file amicus curiae brief filed 11/6/85, orig +9cc,c/s and submitted to panel (with brief in support of appellant's suggestion for hearing <i>en banc</i>)
11/7/85	M.F.ANY.F Appellant's suggestion for hearing <i>en banc</i> filed, orig +12cc,c/s
11/12/85	M.F.ANY.SUBM Appellant's suggestion for hearing <i>en banc</i> submitted to <i>en banc</i> panel
11/18/85	BR.F. Appellees' brief filed, orig. & 25cc. c/s.

DATE	FILINGS-PROCEEDINGS
11/21/85	M.BC.PARTY.DISP—granted motion of Association of American R.R. to file amicus curiae brief in support of suggestion for hearing en banc—McKay, Seymour
11/21/85	M.SUBM.CS.BR.F—appellees' motion to submit case on briefs filed—orig. & 3 cc.—c/s
11/22/85	M.SUBM.CS.BR.RES.F—appellant's response to appellees' motion to submit on briefs filed requesting oral argument—orig. & 3 cc.—c/s
12/5/85	BR.F Appellant's reply brief filed, orig + 9cc,c/s
12/9/85	M.F.ANY.DISP Appellant's motion for hearing en banc denied—en banc panel. (parties served by mail).
12/11/85	M.SUBM.CS.BR.DISP—denied appellees' motion to submit on briefs—McKay, Seymour
12/27/85	HRG.SET.MAR'86 TERM, DENVER
3/20/86	CS.ARG.SUBM—case argued and submitted—McKay, Logan, Baldock
5/2/86	OPN.F. Unpublished, signed opinion filed. McKay, Logan, Baldock JM.DISP. Judgment affirmed.
5/20/86	M.STAY.MDT.F.SUBM. Appellant's motion for stay of issuance of mandate pendin filing for cert filed. 0&3 c/s—and submitted to panel.
6/4/86	M.STAY.MDT.DISP Ordered appellant's motion for stay of issuance of mandate pending filing of cert is denied. McKay, Logan, Baldock (parties notified by mail) MDT.ISS Mandate issued to district court
6/11/86	MDT.RCPT.F Mandate receipt filed

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

v.

OKLAHOMA TAX COMMISSION, *et al.,*
Defendants.

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
3-03-83		COMPLAINT
3-09-83		PLAINTIFF'S Mtn for Leave to Deposit Money into Registry of Ct-ws w/BRIEF in Supp of Plf's Mtn for Leave to Deposit Monies into Registry of Ct
[3-09-83]		AFFIDAVIT of T.C. Wehner in Supp of Plf's Mtn for Leave to Deposit Monies into Registry of Ct
3-11-83		TEMPORARY Restrain Order & Order Grant Leave to Deposit Money into Registry of Ct, clk dird to send attest copy of TRO to Co Treas of each Co w/i State of OK in which Burlington Northern Railroad Company operates (RUSSELL)sls
3-10-83		CERTIFICATE of Mail of AFF of Certain Co Treas in Supp of Dfts' Objec to Payment of Tax Monies into Registry of Ct

DATE	NR	PROCEEDINGS
[3-10-83]		BRIEF of Dft, OK Tax Commission in Oppos to Plf's Mtn for Leave to Deposit Money into the Registry of Ct-w/s
[3-10-83]		ENTER EVID HRG ON PLFS MTN FOR TRO & PLFS MTN TO DEPOSIT MONEY, test presented by dft OK Tax Commn; OK Tax Comm's Ex 1-15 adm; dft State Bd of Equal's Ex 1 adm; plfs Exh 1 adm; arguments presented; mtns grant per order be filed this date (RUSSELL)ve
[3-25-83]		TENDERED \$484,258.04 by Burlington Northern, St. Paul, MN
3-25-83		MOTION TO DISM for Lack of Subj Matter Juris or in Altern for Failure to a State clam upon Which Relief can be Grant, by dfts OK Tax Commr Robert L. Wadley & J. L. Merrill-w/LEAVE grant to file w/o Supp Brief; Supp Brief to be filed before 4-14-83 (RUSSELL)w/s
3-29-83		PLAINTIFF'S Oppos to Dfts' Mtn to Dism for Lack of Subject Matter Juris or in Altern for Failure to State Clm Upon Which Relief Can be Grant-w/s
3-25-83		ORDER Respect Deposit of Funds into Registry of Ct & Investment of Such Funds in Banking Institution, auth signator of acct clk of USDC or US Dist Judg; no w/drals w/o ct order w/cert of Financial Dep Clk (RUSSELL)jm
4-07-83		DFTS State Bd of Equal of State of OK; Nigh, Chairman of State Bd of Equal of State of OK; Bernard; Winters, Craig, Scott, Fisher & Turpen, members of State Bd of Equal of OK, Mtn to Dism-w/s

DATE	NR	PROCEEDINGS
[4-07-83]		DEFENDANTS State Bd of Equal of OK, Nigh, Chairman of State Bd of Equal of OK, Bernard, Winters, Craig, Scott, Fisher & Turpen, member of State Bd of Equal of OK, Brief in Supp of Mtn to Dism w/ ORDER grant lv to file brief in excess of 20 pgs (RUSSELL)w/s
4/11/83		ENTER ORDER, all ptys dird to resp w/supp brief to Mtn to Dism by dft State Bd of Equal, George Nigh, et al on or before 4-22-83; if resp not recd by that date, mtn deem confessed (RUSSELL)ve
4-21-83		BRIEF in support of Dft's Okla. Tax Comm., Mtn to Dism w/s/ (O.K. to file Russell)
4-21-83		RESPONSE of Dft Okla. Tax Comm to Compl for Inj and Decl Relief w/s/
4-21-83		APPENDICES to Resp of Dft. Okla. Tax Commn. to Compl for Inj and Declaratory Relief
4-29-83		BRIEF in Opposition to Mtn to Dism by Dfts State Bd. of Equalization of the State of Okla.; Geo. Nigh, Chairman of The State Board of Equaliz. of the St. of Okla.; Spencer Bernard; Leo Winters; Jack Craig; Clifton Scott; Dr. Leslie Fisher; and Mike Turpen, Members of the St. Bd. of Equalization of the State of Okla., by Plaintiffs w/s/
4-29-83		NOTICE by Clerk to The Hon. Wm. French Smith, Atty Gen. (re constitutionality of question 49 U.S.C. 11503 by a Mtn to Dism w/Brief)w/s
5-06-83		ADDENDUM TO Plaintiff's Brief In Opposition To Motion To Dismiss Filed by Deft Oklahoma Tax Commission (VOL I)

DATE	NR	PROCEEDINGS
5-06-83		ADDENDUM To Plaintiff's Biref In Opposition To Motion To Dismiss Filed by dft Oklahoma Tax Commission (VOL II)
5-12-83		DEFENDANTS' St Board of Equalization of the State of Okla; George Nigh, Chairman Of The Board of Equalization of the St of Okla; Spencer Bernard; Leo Winters, Jack Craig; Clifton Scott; Dr. Leslie Fisher; and Mike Trupen, Members of the State Bd of Equalization of the State of Okla. REPLY BRIEF In Support of Their Motion To Dismiss-w/s
08-30-83		ENTER Order—plf & dft to file brfs w/i (7) days of this date addressing the effect of the 10th Cir opinion of Burlington Northern Railroad Co. v. Lennen — F.2d —, #82-2534 (10th Cir 8-25-83) on this litigation, specifically on dft's mtn to reconsider order to compel (RUSSELL) ve
09-01-83		APPLICATION For Ext of Time to File Brfs As Dir by Court's Order dated 8-30-83; by plf-w/s
09-02-83		ORDER—grtg appl for ext of time for ptys to resp to Ct's Order of 8-3-83; all ptys have until 9-14-83 to file brfs as direct by Ct's Order of 8-30-83 (RUSSELL) ve
09-14-83		PLAINTIFF'S Brf Explaining the Effect of Burlington Northern Railroad Co., et al v. Lennen, et al, #82-2534 (10th Cir., 8-25-83) on this Proceeding-w/s
09-14-83		RESPONSE Brf of the Okla Tax Comm-w/s
10-13-83		MOTION for Lv to Amnd Compl, by plf-w/s
10-13-83		MEMORANDUM in Supp pf Mtn for Lv, to Amnd Compl, by plf-w/s

DATE	NR	PROCEEDINGS
10-27-83		RESPONSE of Dfts, Ok Tax Comm, Odie A. Nance, Robert L. Wadley, & J.L. Merrill, to plf's Mtn for LV to amend complaint-w/s
11-09-83		AMENDMENT To Complaint by plf-w/s
03-01-84	7	REQUEST for Oral Argument by plf-w/s
03-01-84	8	SUPPLEMENTARY Brf & Statement of Facts In Opposition to Mtns To Dismiss filed by dfts, Oklahoma Tax Commission & Its Members -w/s
03-01-84	9	AFFIDAVIT of T. C. Wehner in Supp of Suppl Brf & Statem of Facts In Oppos to Mtns To Dismiss filed by dfts, Okla. Tax Commission & Its Members -n/s
03-21-84	14	RESPONSE of Dfts to Plf's Supplementary Brf & Statement of Facts in Opposition to the Mtn to Dismiss of the Oklahoma Tax Commission, by dfts Oklahoma Tax Comm. & State Bd. of Equalization-w/s
01-08-85	21	ORDER: that dfts' Mtn to Dism in CIV-83-419-R and CIV-83-2165-R are both grtd; that separate judgments will be entered reflecting the action in the Ct (RUSSELL) ne
01-08-85	22	JUDGMENT: that this action is dismiss for lack of subj matter jurisdiction (RUSSELL) (MICRO/JAN '85) ne
01-17-85	24	PLAINTIFF'S Mtn to Stay Ord of Dism Pending Disposition of Post-Trial Mtns-w/s
01-17-85	25	MEMORANDUM in Support of Mtn for Stay, by plf-w/s
01-17-85	26	PLAINTIFFS' Mtn for New Trial, or in the Alternative, for Vacation, Amendment, or Alteration of Judgment-w/s

DATE	NR	PROCEEDINGS
01-17-85	27	MEMORANDUM in Support of Mtn for New Trial, or in the Alternative, for Vacation, Amendment, or Alteration of Judgment
01-18-85	28	ORDER of Stay: that the judgment of Ct entered 01-08-85, which dismiss this action is stayed pending resolution of the plf's mtn filed under Rule 59 of the FRCP; that the consent prelim inj entered by the Ct on 03-15-83, rest & enjoining the collection of plf's 2nd-half installment of 1982 ad valorem tax payments, will remain in full force & effect pending resolution of the plf's post-trial mtn; that the disputed tax monies will remain in the registry of the Ct pending further order by the ct (RUSSELL) cg
02-11-85	32	DEFENDANT'S Brf in Reply to Mtn for New Trial, by Okla Tax Comm, Odie Nance, Robert T. Wadley, J. L. Merrill, and State Bd. of Equalization-w/s
02-19-85	34	PLAINTIFFS Reply to the Dfts' Resp to Plfs' Alternative Mtns for New Trial & for Vacation, Amendment or Alteration of Judgment-w/s
04-29-85	35	ORDER that Plf's Mtn for New trial, or in the alternative for Vacation, Amendment, or Alteration of Judgment is denied to the extent that it challenges dismissal of No. CIV-83-419-R; that Plf's Mtn for New trial, or alternatively for Vacation, Amendment, or Alteration of Judgment is granted to the extent it challenges dismissal in No. CIV-83-2165-R; that the order of dismissal in No. CIV-83-2165-R is vacated; that plf's Mtn for Consolidation is denied; that Case No. CIV-83-2165-R is stayed & administratively closed pending appeal of the Ct's decision in Case No.

DATE	NR	PROCEEDINGS
		CIV-83-419-R; ptys directed to keep Ct apprised of appellate proceedings in No. CIV-83-419-R (RUSSELL) ne
05-01-85	36	NOTICE of Appeal by plf from judgment entered 1-8-85 & denial of plf's mtn to alter or amend judgment on 4-29-85 -w/s
05-01-85	37	PLAINTIFF'S Mtn for Inj Pending Appeal -w/s
05-01-85	38	BRIEF in Support of Mtn for Inj Pending Appeal -w/s
05-01-85		RECEIVED \$70 filing & docketing fee on appeal. Receipt #42484.
05-01-85	39	CLERK'S ltr re serv of Notice of Appeal, w/cpy ltr, Notice & docket sheet to cnsl & CCA -mlc #85-1657
05-15-85	40	ORDER Setting Oral Arg on Plf's Mtn for Inj Pending Appeal; that oral args on plf's mtn for inj pending appeal will be heard on 05-24-85 at 9:00 a.m. (RUSSELL) ne
05-17-85	41	DEFENDANT'S Resp to Plf's Mtn for Inj Pending Appeal-w/s
05-17-85	42	BRIEF in Support of Dft's Mtn for Inj Pending Appeal-w/s
05-24-85	43	INJUNCTION Pending Appeal; that the inj entered on 03-15-83 shall remain in full force & effect during pendency of the appeal (RUSSELL) jh
03-15-86	45	CLERK'S Letter Transmitting Record on Appeal to CCA, consisting of 3 Volumes w/ copy letter, Index & docket to cnsl & CCA -aa

DATE	NR	PROCEEDINGS
03-31-86	46	CCA's order re appellant Burlington Northern Railroad Co's mtn to supplement Record on Appeal; grtd, Clk of Dist Ct is ord to cery & transm as supplement docs, 1. Deposition of J.L. Merrill, filed in Dist Ct case Civ-83-2165-R; 2. Deposition of David Taylor, filed in Dist Ct case Civ-83-2165-R; 3. Deposition of Robert Hartman, filed in Dist Ct case Civ-83-2165-R. (McKay, & Seymour) sa
03-31-86	47	CLERK'S ltr transm Supplemental Record, Vol 3, to CCA, w/cpy ltr & Index to cnal -sa
06-09-86	48	MANDATE of CCA (Judgm Affirmed) (McKay, Logan & Baldock) (CCA #85-1657)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T. WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,
Defendants.

[Filed Apr. 21, 1983]

RESPONSE OF DEFENDANT OKLAHOMA TAX
COMMISSION TO COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF

Defendant Oklahoma Tax Commission, Odie A. Nance, Chairman of the Oklahoma Tax Commission, Robert L. Wadley, Vice-Chairman of the Oklahoma Tax Commission, and J. L. Merrill, Secretary-Member of the Oklahoma Tax Commission, for answer and defense to the allegations set forth in the Complaint For Injunctive and Declaratory Relief denies each and every such allegation

except as hereinafter expressly admitted. The following numbered paragraphs of this Response correspond to the numbered paragraphs of the Complaint.

1. Defendant admits 49 U.S.C. § 11503 grants this Honorable Court jurisdiction, concurrent with state courts of Oklahoma, to prevent ad valorem tax discrimination against rail transportation property where and only if:

(a) the *assessment ratio* of assessed value to true market value of such rail transportation property is greater than or exceeds by at least five percent (5%) the assessment ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction; or,

(b) the *tax millage rate* (levy) of any local taxing jurisdiction applied to the assessed valuation of rail transportation property is greater than or exceeds the tax millage rate of same local taxing jurisdiction applied to commercial and industrial property in the same assessment jurisdiction.

Defendant specifically denies that it is a proper party to this purported action as Defendant neither assesses, levies or collects ad valorem tax. Defendant is the fact gathering arm of the State Board of Equalization. Defendant's duty is to receive annual ad valorem tax reports the various railroad and public service corporations that operate within the State of Oklahoma and thereupon to make findings of valuation and recommendations of assessment to the State Board of Equalization for assessment purposes. 68 O.S.1981, § 2454. Further, as assistance to the State Board, Defendant has a duty to make investigations and inspections when necessary to assure that no such property escapes taxation. 68 O.S.1981, §§ 2454 and 2455. Defendant has no statutory duties or powers to assess, levy or collect ad valorem taxes in the State of Oklahoma. The Oklahoma Constitution, Article X, § 21 mandates the State Board of Equalization assess

property of railroads; and, Article X, § 9 prohibits the state from levying any ad valorem tax.

Defendants specifically denies that any of its acts are subject to the prohibition in 49 U.S.C. § 11503.

Active concert and active participation under Rule 65(d) of the Federal Rules of Civil Procedure is a question of fact for the Court, and Defendant requests Plaintiff be required to make a strict showing thereof. Defendant denies that any person not named as a Defendant herein has or is acting in active concert or active participation regarding any of the allegations set out in the Complaint herein. 61 A.L.R. Fed. 402.

On April 25, 1982, the Oklahoma Tax Commission laid its recommendations for 1982 ad valorem tax assessments of railroad and public service corporation property before the State Board of Equalization. (Defendant's Appendices: A.)

On May 19, 1982, the State Board of Equalization assessed the property of railroad and public service corporations for ad valorem tax purposes. (Defendant's Appendices: B.)

The 1982 ad valorem tax assessment recommended by the Oklahoma Tax Commission on April 25, 1982 and assessed by the State Board of Equalization on May 19, 1982 is not excessive nor unlawful under 49 U.S.C. § 11503 as:

(a) The average statewide assessment ratio applied to true market value (use value) of commercial and industrial property as determined from the 1981 ratio study of the levels of local assessments of commercial and industrial property is 10.87%. (Defendant's Appendices: C.)

(b) That assessment percentage, 10.87%, was applied to the true market value (use value) of the railroad property of Plaintiff for calculation of 1982 assessed valuation.

JURISDICTION

2. Defendant specifically denies that this Court has subject matter jurisdiction over the purported Complaint filed herein. (Defendant's Motion to Dismiss and Brief in Support filed herein.)

(a) 49 U.S.C. § 11503 does not confer subject matter jurisdiction upon the federal courts except to prevent the four specified acts declared therein to be unreasonably burdensome and discriminate against interstate commerce, to-wit:

- "(1) excessive assessment percentage or ratio;
- (2) levy upon an assessed value calculated with an excessive assessment percentage;
- (3) excessive millage levy; or
- (4) imposition of another discriminatory tax.

As set out in paragraph numbered 1., Plaintiff's rail transportation property, for 1982 ad valorem tax purposes in Oklahoma, was assessed at 10.87 assessment ratio which is the same, exact statewide average assessment ratio applied to local assessed commercial and industrial property as determined from the most current completed study of levels of assessment by county assessors within Oklahoma as of April 23, 1982.

(b) 28 U.S.C. § 1341 bars subject matter jurisdiction granted under 28 U.S.C. § 1337.

(c) 28 U.S.C. § 1341 bars subject matter jurisdiction granted under 28 U.S.C. § 1331.

PARTIES

3-10. Defendant admits Plaintiff's allegations in paragraphs numbered 3-10.

AD VALOREM TAXATION IN OKLAHOMA

11. Defendant admits that 64 O.S.1981, § 2404 specifies property subject to ad valorem taxation in Oklahoma. The Oklahoma Constitution, Art. X, Section 6 specifies property exempt from a valorem taxation and Art. V, Section 50 prohibits the Legislature from enacting any law exempting property from taxation except as provided in the Constitution.

12. Defendant admits that 68 O.S.1981, § 2427 mandates the county assessor shall assess all property subject to local assessment. Defendant specifically denies that § 2427 is pertinent or applicable herein.

13. Defendant admits that 68 O.S.1981, § 2444 is the legislative mandate, required by Oklahoma Constitution Art. V, § 59, that the local millage (tax levies) be uniform upon all taxable property within the taxing jurisdiction. Defendant specifically responds that it is this uniformity that precludes subject matter jurisdiction herein under 49 U.S.C. § 11503, (b) (3).

Defendant specifically denies that every railroad, including Plaintiff, does make its return on or before March 15 of each year. Defendant specifically responds that under 68 O.S.1981, § 2453, the Oklahoma Tax Commission may extend the time for 15 days. Plaintiffs filed its verified return form on March 31, 1982, returning no value for track and right of way; and later other information was filed. (Defendant's Appendices: D.)

14. Defendant specifically admits that under 68 O.S. 1981, § 2454 the Oklahoma Tax Commission is enjoined with mandatory, discretionary duties to assist the State Board of Equalization in the assessment of real and personal rail transportation property of plaintiff. Defendant specifically responds that the Oklahoma assessment procedure requires three steps: (1) full valuation X (2) assessment percentage = (3) assessed valuation. (*Cantrell v. Sanders*, 610 P.2d 227 (Okla: 1980)).

Defendant specifically responds that the procedures for recommendations of assessment of rail transportation property, the Oklahoma Tax Commission determines full system unit value allocated to Oklahoma and applies the assessment percentage thereto to calculate recommended assessed value:

- (1) original cost of assets \times 40%
- (2) capitalized net operating income \times 60%
- (3) =system value \times allocation factor \times assessment percentage = assessed value.

(Capitalized net operating income is calculated by weighing the last three years income the most recent year 3, next most recent year 2 and last most recent year 1, capitalized at 14% for 1982 calculation.)

(Original cost is based upon cost paid during early statehood for a great portion of Plaintiff's rail transportation property.)

(Allocation is based upon seven factors as reported by the Plaintiff.) (Defendant's Appendices: D and E.)

Further Defendant specifically responds that the Oklahoma Tax Commission has a clear, specific statutory duty to make its recommendation to the State Board of Equalization as to assessment of railroad property of Plaintiff, on or before April 25 of each year. (68 O.S.1981, § 2454); that the 10.87 assessment percentage or ratio was recommended to the State Board of Equalization for the specific, stated purpose of compliance with the 4-R Act, 49 U.S.C. § 10101, et seq. (Defendant's Appendices: A); that during 1981, in its equalization of the local assessments, the State Board of Equalization rejected the findings and recommendations of the Oklahoma Tax Commission for equalization; that the validity of the 1981 Ratio Study of the levels of local assessment was attacked and presented to the Oklahoma Supreme Court in *Poulos v. State Board of Equalization, et al.*, 646 P.2d 1269

(Okla: 1982) (Poulos III) decided May 25, 1982, six days after the May 19, 1982 assessment involved herein; that at the statutorily required time for making recommendations, (April 25, 1982) the Oklahoma Tax Commission did not have resolution as to the validity of its 1981 Study and that the 1982 Study was incomplete as same is not required or even possible to complete until the third Monday in June of each year, (68 O.S.1981, § 2473) the mandated time for filing of abstracts of assessments by the county assessors with the Oklahoma Tax Commission; and that, in order to, in good faith, comply with 49 U.S.C. § 11503, recommendation was made for assessment of all rail transportation property of any railroad operating within Oklahoma at the same percentage of Oklahoma full value (use value/true market value) as the statewide average local assessment percentage for commercial and industrial property.

15. Defendant specifically admits Plaintiff's paragraph number 15.

16. Defendant specifically admits that 68 O.S.1981, § 2456 requires the State Board of Equalization to certify the assessed values of property of railroads and public service corporations to the various county assessors on or before the *third Monday* in June of each year; that the assessment of such property is complete when the State Board of Equalization is mandated to meet on the *fourth Monday* in June to equalize local assessments, 68 O.S. 1981, § 2463.

17. Defendant specifically admits that 68 O.S.1981, § 2462 enjoins certain powers and duties upon the Oklahoma Tax Commission regarding equalization of local assessments. Defendant specifically denies that § 2462 is pertinent or applicable herein, except that it is the statutory duty which causes the annual studies of levels of local assessments to be completed by the Oklahoma Tax Commission.

18. Defendant specifically denies that 68 O.S.1981, § 2463 is pertinent or applicable herein; and, Defendant advises that in Poulos III the highest court of this state had before it issues and allegations based upon no evidence as to levels of local assessments *except* the 1981 Study of the Oklahoma Tax Commission; at page 1273, the Court decreed:

"There being no valid reason shown for not adopting the 12% ratio as recommended by the Commission, we hereby determine by judicial decree that all property within the State of Oklahoma subject to ad valorem taxes shall be assessed at 12% of its taxable value with permissible inter-county deviations of not more than 3% above or below the mean, and that said percentage shall apply to the 1982 tax year and thereafter until such time as the same shall be changed by the recommendation of the Commission and the determination by the Board based upon good and sufficient valid, legal grounds as provided in 68 O.S.1971, § 2463."

further Defendant advises that in 1982, Plaintiffs protested, under 68 O.S. 1981, § 2466, valuation of its Oklahoma rail transportation property; that administrative hearing was not had prior to filing the Complaint herein; that the 1982 administrative protests of public service corporations were resolved in *McLoud Telephone Company v. State Board of Equalization, et al.*, decided December 16, 1982; that in *McLoud*, the 26% assessment percentage applied to Oklahoma full value of taxable property of the public service corporations, other than railroads, to calculate assessed value was upheld; and, that the Court held that assessments by the State Board of Equalization were unaffected by the cases involving uniformity or equalization of local assessments. (*Poulos v. State Board of Equalization*, 552 P.2d 1134 (Okla: 1975); *Poulos v. State Board of Equalization*, 552 P.2d 1138 (Okla: 1976); *Cantrell v. Sanders*, 610 P.2d 227 (Okla: 1980) and *Poulos III*.)

19. Defendant specifically admits that 68 O.S.1981, § 24303 authorizes ad valorem taxes do not become *delinquent* if one-half paid on or before January 1 and one-half paid on or before March 31 of each year.

SECTION 306

20. Defendant specifically responds that Section 306 quoted by Plaintiff was amended in 1978 prior to the effective date of the Section and that 49 U.S.C. § 11503 is clear, unambiguous and speaks for itself. (Defendant Appendices: F.)

21. Defendant specifically admits the definition of assessment as set forth in § 11503, *supra*, but denies that assessment is defined to mean any valuation other than the assessed valuation upon which the tax millage is applied as used in § 11503(b)(2).

22. Defendant specifically denies the definition of "transportation property" as alleged; § 11053(a)(3) defines "rail transportation property". Defendant specifically denies that all operating property of the Burlington Northern that is subject to ad valorem taxation by the State of Oklahoma is "transportation property" within the meaning of § 11503; Burlington Northern Company report for 1980 indicates the diversified business interests to have property subject to ad valorem taxation in Oklahoma that is not "rail transportation property". (Defendant's Appendices: G.)

23. Defendant specifically admits the definition of "commercial and industrial property" as set out in § 11503. Defendant responds that in 1981, the assessment percentages applied to the use valuation (true market value) of locally assessed commercial and industrial property by the 77 county assessors had a statewide average of 10.87%; that in 1981 the assessment percentage applied to the Oklahoma full value (true market value) of railroad and public service corporation property ranged

from 8.25% to 35%, the Constitutional maximum, constituting a range of deviation of 26.75% (Defendant's Appendices: H); that for 1982 ad valorem tax assessment purposes, the Oklahoma Tax Commission treated property of railroads and public service corporations as separate and distinct classes of property because such classifications are specifically referred to in the Constitution and Statutes of this state and decisions of the Oklahoma Supreme Court; that the 1982 recommendations of the Oklahoma Tax Commission and the 1982 assessments of the State Board of Equalization removed any discriminatory effect created by a range of assessment percentages within each of the two classes by assessing the property of any corporation within each class at a single, uniform assessment percentage (i.e., railroads at 10.87% and public service corporations at 26%). Defendant's Appendices: H and J.)

24. Defendant specifically denies Plaintiff's paragraph numbered 24. Defendant specifically responds that the congressional studies (Plaintiff's Appendix) showed rail property in Oklahoma was assessed at 60% of full value in 1950, while other property was assessed at 20%; that the congressional reports (Plaintiff's Appendix) showed rail property in Oklahoma was assessed at 35% in 1968 while other property was assessed at 18%; that upon enactment of the "4-R Act in 1976, State of Oklahoma began a program to eliminate any discriminatory tax burden on rail transportation property due to ad valorem tax assessments; that the current valuation formula to determine system unit value allocated to Oklahoma was initiated as well as reduction in the assessment percentage (Defendant's Appendices: I); and, that in 1981, the mean assessment percentage applied to rail transportation property was 10.29%; Burlington Northern was assessed at 10.99%. (Defendant's Appendices: J.)

ASSESSMENT OF BURLINGTON NORTHERN'S PROPERTY FOR THE 1982 TAX YEAR

25. Defendant specifically denies Plaintiff's paragraph numbered 25. Defendant specifically responds that for the 1981 assessment, based on information from the ICC R-1 report as of December 31, 1980, the Oklahoma Tax Commission made findings that the Oklahoma allocated value of the system unit value of Burlington Northern's rail transportation property was \$136,563,361.00; this finding was based upon system unit value of \$3,641,689,619.00 allocated to Oklahoma at 3.75%; that the Oklahoma Tax Commission recommended and the State Board of Equalization assessed the Burlington Northern at 10.99% of its Oklahoma value or \$15,014,650.00 assessed value (Defendant's Appendices: J and K); and, that the Burlington Northern had returned its self-assessed value of Oklahoma taxable property at \$14,335,355.00 (Defendant's Appendices: L.) (Prior to the 1959 Amendment to the Oklahoma Constitution limiting assessment to 35%, the "returned value" was ideally "100% value". With the 35% limit, "returned value" became the recommended "assessed value" by the taxpayer or the self-assessment. (Exhibit A to Affidavit of Hal L. Hefner filed April 11, 1983.) Plaintiff's admitted an assessed value in 1981 of \$14,335,355.00 which is greater than the 1982 assessed value of \$13,717,367.00.

26. Defendant specifically denies Plaintiff's paragraph numbered 26.

27. Defendant specifically responds that the ratio study set out hereinbefore was conducted by the Oklahoma Tax Commission and that the statewide average assessment percentage applied to commercial and industrial property by the various county assessors was 10.87% in 1981.

28. Defendant specifically denies Plaintiff's paragraph numbered 28. Defendant specifically responds that for the

1982 assessment, based on information from the ICC R-1 report as of December 31, 1981, the Oklahoma Tax Commission made findings that the Oklahoma allocated value of the system unit value of Burlington Northern's rail transportation property was \$126,194,731.00; this finding was based upon system unit value of \$3,574,921,544.00 allocated to Oklahoma at 3.53%; that the Oklahoma Tax Commission recommended and the State Board of Equalization assessed the Burlington Northern at 10.87% of its Oklahoma value or \$13,717,367.00 assessed value. (Defendant's Appendices: B and M.)

29. Defendant specifically denies Plaintiff's paragraph numbered 29, except, Defendant specifically admits the assessment by the State Board of Equalization on May 19, 1982. (Defendant's Appendices: B.)

30. Defendant specifically admits Plaintiff's paragraph numbered 30.

31. Defendant specifically admits that the Plaintiff protested the May 19th assessment and specifically deny all other allegations contained in Plaintiff's paragraph numbered 31.

32. Defendant specifically responds that Defendant has no exact knowledge of Plaintiff's paragraph numbered 32.

33. Defendant specifically denies Plaintiff's paragraph numbered 33.

BURLINGTON NORTHERN'S SECTION 306 (§ 11503) CLAIM

34-43. Defendant specifically denies each and every allegation set forth in Plaintiff's paragraph numbered 34 through 43. Defendant specifically responds that Plaintiff's paragraphs numbered 34 through 43 present a pure valuation (appraisal) controversy, unaccompanied by any

discrimination; that the State of Oklahoma has lowered year after year the assessed values of railroad property in compliance and specifically has *continually* lowered the tax burden of Burlington and its predecessor, the St. Louis and San Francisco Railroad Company; that the decrease in tax burden of this Plaintiff has been *very* substantial; that Congress determined that there existed instances of excessive assessments and, hence, tax discrimination in 1965 and for this reason 1965, as a benchmark for the expression of certain values, which are, of course, not constant due to the effects of inflation on "Dollar" figures, is used to demonstrate the serious reduction in tax burden that Plaintiff has enjoyed due to the 4-R Act; that, a real Dollar comparison shows to what very significant degree Oklahoma has lowered Burlington's "assessment"; that, where an assessment decreases, assuming tax rates are unchanged, then taxes paid will accordingly be decreased; that since Burlington has made no averment of tax rate discrimination, it must be assumed that the purported "discrimination" arises solely from the assessment figure itself; that a historical analysis shows that even discounting inflation, Burlington's system values have inexorably been lowered over a thirty-three (33) year period (see Exhibit "A" to Affidavit of Hal L. Hefner); that when these figures are adjusted for inflation based upon the rate of inflation, as calculated by the Implicit Price Deflator for Railway Equipment, United States Department of Labor, then the amounts are compared on a constant Dollar basis, and the extreme reductions Oklahoma has made in Plaintiff's assessment amounts are readily apparent; (Affidavit of Gene Tyner, Sr.); that, for example, in 1965 Dollars, the assessment of Frisco was \$29,680,459.00. In 1981, Burlington's assessment was \$15,014,650.00 (\$4,438,866.17; 1981 Dollars equivalent value in 1965 based upon Implicit Price Deflator Indices); that in 1982, the disputed year, Burlington's assessment was \$13,717,367.00 (\$3,703,689.00; 1982 Dollars equivalent value in 1965); that these figures

show that the 1965 assessment of \$29,680,495.00 has been reduced in the subsequent seventeen years to a figure (expressed in comparable values) of \$3,703,689.00; that this is a *decrease* of approximately 799.93% in Burlington's assessment amount from the benchmark year, 1965, wherein Congress found tax discrimination; that the 1981 assessment figure of \$15,014,650.00 expressed in 1982 Dollars is: \$16,410,562.50; that the 1982 disputed assessment (also in 1982 Dollars), therefore, expresses a *reduction* of approximately 16% in assessment amount over the prior tax year (Exhibit "F" to Tyner Affidavit); that when actual assessment amounts (affidavit of Hal Hefner) are compared, there has been a constant reduction up to and *including* the tax year (1982) in question; that when comparisons are calculated discounting the effects of inflation (affidavit of Gene Tyner, Sr.) then these constant reductions expressed in the same value, are even more significant; that *never* in modern history has either the Oklahoma Tax Commission (through its recommendation) or the Oklahoma State Board of Equalization (through its assessment) raised or inflated Burlington's Oklahoma system assessment amount from that of the previous year; that the decline of Burlington's assessment has been continuous and significant; that when rates of reduction from the 1965 assessment (Tyner Affidavit, Exhibit "F") are compared to rates of reduction of the railroad's rendered value (Tyner Affidavit, Exhibit "E"), Oklahoma's rate of decrease is greater up to 1982. However, in 1982, the State Board's assessment drops another 2.25% to 12.50% of what it assessed in 1965. Nevertheless, Burlington proposes its value to drop to 10.71% of what it rendered in 1965 or, stated differently, to approximately one-third that which it rendered the prior year (29.25% to 10.71%).

44. WHEREFORE, Defendant prays that this Court deny and refuse to grant any relief to Plaintiffs and dismiss Defendant with cost.

OKLAHOMA TAX COMMISSION

/s/ J. Lawrence Blakenship
J. LAWRENCE BLANKENSHIP
General Counsel

/s/ Donna E. Cox
DONNA E. COX
Attorney
2501 Lincoln Boulevard
Oklahoma City, OK
73194-0011
(405) 521-3141

[Certificate of Mailing Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,
vs. *Plaintiff,*

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN
OF THE OKLAHOMA TAX COMMISSION; ROBERT T.
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF
EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE
NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZA-
TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE
FISHER; and MIKE TURPEN, MEMBERS OF THE STATE
BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,
Defendants.

APPENDICES TO RESPONSE OF DEFENDANT
OKLAHOMA TAX COMMISSION TO COMPLAINT FOR
INJUNCTIVE AND DECLARATORY RELIEF

[Filed Apr. 21, 1983]

J. LAWRENCE BLANKENSHIP
General Counsel

DONNA E. COX
Attorney

2501 Lincoln Boulevard
Oklahoma City, OK 73194
(405) 521-3141

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* Not reproduced as part of this item of the Joint Appendix.

[SEAL]

OKLAHOMA TAX COMMISSION
 STATE OF OKLAHOMA
 2501 Lincoln Blvd.
 Oklahoma City, Oklahoma 731940001

April 23, 1982

Odie A. Nance, Chairman
 Robert L. Wadley, Vice-Chairman
 J. L. Merrill, Sec'y-Member

HAND DELIVERED

State Board of Equalization
 State Capitol Building
 Oklahoma City, Oklahoma 73105

[Filed Apr. 26, 1982]

Re: Annual Assessment of
 Railroad and Public Service
 Corporations.

Dear Sirs:

Attached are the findings of the Oklahoma Tax Commission as to the assessment of all railroad and public service corporation property pursuant to 68 O.S. 1968, § 2454 for your final action under Section 21, Article X of the Constitution.

Also, you find attached a copy of a Memorandum dated April 23, 1982, from our Management Services Division which explains the steps we are recommending to achieve uniformity in assessment ratios.

A copy of this letter with the above Memorandum is being furnished each Board member.

Respectfully,

OKLAHOMA TAX COMMISSION

/s/ Odie A. Nance
 ODIE A. NANCE
 Chairman

/s/ Robert L. Wadley
 ROBERT L. WADLEY
 Vice Chairman

/s/ J. L. Merrill
 J. L. MERRILL
 Secretary-Member

OFFICE CORRESPONDENCE

OKLAHOMA TAX COMMISSION

Equalizing Assessment Ratios
Applied to Railroads and
Subject Public Service Companies

To Odie A. Nance, Chairman
Robert L. Wadley, Vice Chairman

From J. L. Merrill, Secretary-Member
Reece Womack, Economist
Management Services Division

Date April 23, 1982

Division No. 18

In March 1982 the Commissioners of the Oklahoma Tax Commission made an examination of the assessment ratios applied to railroads and public service companies in the 1981 assessment year. It was found that the ratios for railroads ranged from a low of 8.25% to a high of 19.75%.

In the case of public service companies, the ratios ranged from a low of 11.54% to a high of 34.99%. It was decided at this time that this wide a range did not represent sufficient equality of treatment within like classes of property.

The Commissioners asked the Economic Research Section to devise a range of ratios for each of these classes of property (railroads and public service companies) that had the following characteristics:

- (1) all ratios would be within a 6% range, i.e., $\pm 3\%$

- (2) This range would be such as to not cause a decrease in total assessed value for the assessment year 1981.

The following ranges were developed. These ranges were calculated using 1981 assessment year data to the nearest 1/100 of one percent. This range for railroads is 8.32%-14.32%. This range of ratios resulted in an increase of only \$3,615 over the 1981 total assessed value of \$58,821,138. The resulting range for public service companies is 23.59%-29.59%. This range of ratios resulted in an increase in total assessed value of \$200,969. This represents an increase of 1/10,000 of one percent over 1981 total assessed value.

The Commissioners also requested that single ratio be developed for these two classes of property that would not result in a decrease in total 1981 assessed value. The resulting ratio for railroads was 11.32%. The resulting ratio for public service companies was 26.5% (this ratio was only calculated to the nearest 1/10 of one percent).

The following decisions were then made by the Commissioners. Railroads would all be set at a single ratio. The ratio developed by the Economic Research Section was modified due to a Federal ruling. The Federal Courts have ruled that railroads can not be assessed at a higher rate than comparable commercial/industrial property in the same locality. Since railroads usually have property in several counties in the state, it was decided to apply the statewide average ratio for industrial/commercial property to railroads. This average was 0.87% in 1981. (Note: 1982 data will not be available till June 1982.)

In the case of public service companies, the 1981 ratio range was more extreme than in the case of railroads. Also, the absolute dollar amounts involved in moving immediately to a single ratio would be more disruptive.

Hence, the Commissioners decided to use the range developed by the Economic Research Section of no more than 6 percentage points ($\pm 3\%$) deviation between all public service companies. This range is 23.59% to 29.59%. New companies were assigned the midpoint of this range; i.e., 26.59%. The desire was expressed on the part of the Commissioners to move to a single assessment ratio for public service companies in the near future.

The practical effect of the above procedures is as follows:

- (1) any company whose 1981 assessment ratio was below 23.59% was raised to 23.59% for 1982.
- (2) any company whose 1981 assessment ratio was above 25.59% was decreased to 29.59% for 1982.
- (3) any company whose 1981 assessment ratio was within the 23.59% to 29.59% range retained the same assessment ratio for 1982.
- (4) any new company was assigned the assessment ratio of 26.59% (the midpoint of the range) for 1982.

If there are any further questions about the above outlined methodology, please let me know.

[SEAL]

OKLAHOMA TAX COMMISSION
STATE OF OKLAHOMA
 2501 Lincoln Blvd.
 Oklahoma City, Oklahoma 731940001

Odie A. Nance, Chairman
 Robert L. Wadley, Vice-Chairman
 J. L. Merrill, Sec'y-Member

SUMMARY OF FINDINGS AND RECOMMENDATIONS OF THE OKLAHOMA TAX COMMISSION FOR ASSESSMENT OF PROPERTY OF RAILROAD AND PUBLIC SERVICE CORPORATIONS

1. The laws of this state provide that the State Board of Equalization assess all railroad and public service corporation property. Section 21, Article 10, Oklahoma Constitution and 68 O.S. 1981, § 2455.

2. The laws of this state provide that the Oklahoma Tax Commission shall make its findings as to the assessment of all railroad and public service corporation property and make recommendations to the State Board of Equalization for assessment of such property. 68 O.S. 1981, § 2454.

3. In the findings and recommendations of the Oklahoma Tax Commission, property of railroads and public service corporations are treated as separate and distinct classes of property because:

a. The clasifications of "railroads" and "public service corporations" are referred to in both the Constitution of Oklahoma and the Oklahoma Statutes; and

b. The Interstate Commerce Act, Title 49 of the United States Code, and federal court decisions require that property of railroads be assessed at a per-

centage of the total value that is no greater than the percentage at which private, commercial property is assessed.

4. The Oklahoma Tax Commission recommends assessment of property of railroads at 10.87% of the total value, which the Commission finds to be consistent with federal enactments and court decisions.

5. The Oklahoma Tax Commission recommends assessment of property of public service corporations at percentages ranging from 23.59% to 29.59%.

6. Submitted herewith are findings and recommendations of the Oklahoma Tax Commission regarding assessment of property of all railroad and public service corporations in the State of Oklahoma previously transmitted to each member of the State Board of Equalization on April 26, 1982.

Respectfully submitted this 19th day of May, 1982.

TABLE 1
OKLAHOMA TAX COMMISSION RECOMMENDATIONS TO THE BOARD OF EQUALIZATION
CONCERNING ASSESSED VALUATIONS OF RAILROADS
FOR THE ASSESSMENT YEAR 1982
(THE 1982 RATIOS ARE BASED ON A RATE OF 10.87%)

	1982 Fair Cash Value	1982 Ratio	Recom- mended Assessed Value Before Penalty	Penalty, Value Plus If Any	Recom- mended Assessed Value Plus Penalty
# 1 The Arkansas Western Railway Company	108557.	10.87%	11800.	0.	11800.
# 2 The Atchison, Topeka & Santa Fe RR Co.	166884316.	10.87%	18140325.	0.	18140325.
# 3 Burlington-Northern Railroad Company	126194733.	10.87%	13717367.	0.	13717367.
# 4 Chicago, Rock Island & Pacific RR Co.	31929578.	10.87%	3470745.	0.	3470745.
# 5 Fort Smith & Van Buren Railway Company	376856.	10.87%	40964.	0.	40964.
# 6 Hollis & Eastern Railroad Company	111159.	10.87%	12083.	0.	12083.
# 7 The Kansas City Southern Railway Company	29223999.	10.87%	3176649.	0.	3176649.
# 8 Missouri-Kansas-Texas Railroad Company	50065932.	10.87%	5442167.	0.	5442167.
# 9 Missouri Pacific Railroad Company	70106568.	10.87%	7620584.	0.	7620584.
# 10 Northwestern Oklahoma Railroad Company	255529.	10.87%	27776.	0.	27776.
# 11 Oklahoma City Junction Railway Company	47087.	10.87%	5118.	0.	5118.
# 12 St. Louis Southwestern Railway Company	7534230.	10.87%	818971.	0.	818971.
# 13 Sand Springs Railway Company	1783898.	10.87%	193910.	0.	193910.
# 14 Texas, Oklahoma & Eastern Railroad Co.	40470562.	10.87%	4399150.	0.	4399150.
# 15 Tulsa-Sapulpa Union Railway Company	520925.	10.87%	56625.	0.	56625.

[Oklahoma Tax Commission Recommendations to the Board of Equalization Concerning Assessed Valuations of Public Service Companies For the Assessment Year 1982 omitted.]

[Item C, 1981 Ratio Study and Transmittal Letter of June 20, 1981, omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN
OF THE OKLAHOMA TAX COMMISSION; ROBERT T.
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF
EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE
NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZA-
TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE
FISHER; and MIKE TURPEN, MEMBERS OF THE STATE
BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,
Defendants.

AFFIDAVIT OF HAL L. HEFNER

Hal L. Hefner, of lawful age, being first duly sworn
upon his oath, deposes and states:

1. Affiant is an employee of the Oklahoma Tax Com-
mission and presently serves as the Director of the Ad
Valorem Tax Division of the Oklahoma Tax Commission.

2. That as part and parcel of his duties as Director,
Ad Valorem Tax Division, affiant is the official custodian
of all books, records or documents kept or maintained by
said Division, and accordingly, makes the following state-
ments of his own personal knowledge.

3. The attached is a true and accurate copy of the
executed State Summary Sheet of the Annual Return of
the Burlington Northern Railroad, Inc. for 1982 ad
valorem tax purposes; and a true and correct copy of the
information submitted by the Burlington setting out the
percentages for the allocation factor to Oklahoma; that
said information is part of the 1982 ad valorem tax re-
turn filed by said railroad and is maintained as part of
the files of the Ad Valorem Tax Division of the Okla-
homa Tax Commission.

Further, affiant sayeth not.

/s/ Hal L. Hefner
HAL L. HEFNER

STATE OF OKLAHOMA,)
) ss:
COUNTY OF OKLAHOMA.)

Subscribed and sworn to before me this 21st day of
April, 1983.

/s/ Linda Hardy
Notary Public

My Commission Expires: March 27, 1985

BURLINGTON NORTHERN RAILROAD COMPANY
AS REQUESTED IN LETTER FROM OKLAHOMA
TAX COMMISSION DATED JANUARY 8, 1982

1. Comparative System Balance Sheet at close of business December 31, 1981. (Will be forwarded as soon as completed.) There is no comparative *system* balance sheet as of December 31, 1980.
2. Schedule of Operating Equipment Leased from Others. (CS 0325.2 Attached.)
3. Schedule of Equipment Leased to Others. (CS 0325.3 Attached.)
4. 1977 thru 1981 Systems Earnings Statement. (Attachment 1.) Combines BN, SLSF and C&S.
5. Oklahoma proportion based on the following factors:

(a) All track mileage	4.52%
(b) Main track mileage	4.99%
(c) Car miles	3.26%
(d) Locomotive miles	3.50%
(e) Traffic units	2.25%
(f) Gross operating revenue	3.53%
(g) Total investment	2.65%

(*)

6. Total 1981 average market value of outstanding stock and debt as of December 31, 1981.
(CS 0308.3) Will be forwarded as soon as completed.
7. All information regarding this question is being furnished directly from Mr. Wehner of our Springfield office.
8. Signed copy of OTC Form 913-S.
9. Information regarding the 1981 mergers is covered in our Shareholders Report.

Copy of Burlington Northern RR and Colorado & Southern Railroad's R-1 Report will be mailed as soon as they are completed.

Enclosed is copy of Burlington Northern RR Co. Annual Report (R-1) which has been filed with the I.C.C. for 1982. A copy of the Shareholders Report is enclosed.

- (*) 5-A. Please see Schedule # 330 for additions and betterments to the railroad system and Oklahoma. We do not maintain records on cost of reproduction new, less depreciation.

Thank you for allowing the extension of time for filing this report.

Should you need additional information for determining value, please contact Raymond E. Durbala, Manager Tax Administration, Burlington Northern RR Co., 176 East Fifth Street, St. Paul, Minnesota 55101.

[Further Attachments to Affidavit Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN
OF THE OKLAHOMA TAX COMMISSION; ROBERT T.
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF
EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE
NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZA-
TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE
FISHER; and MIKE TURPEN, MEMBERS OF THE STATE
BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,
Defendants.

AFFIDAVIT OF HAL HEFNER

Hal L. Hefner, of lawful age, being first duly sworn
upon his oath, deposes and states:

1. Affiant is an employee of the Oklahoma Tax Commis-
sion and presently serves as the Director of the Ad
Valorem Tax Division of the Oklahoma Tax Commission.
2. That as a part and parcel of his duties as Director, Ad
Valorem Tax Division, affiant is the official custodian of
all books, records or documents kept or maintained by
said Division, and accordingly, makes the following state-
ments of his own personal knowledge.
3. The attached is a true and accurate copy of the
Railroad Assessment Work Sheet in blank, that was

utilized by the Ad Valorem Tax Division for valuation
of the railroad property of each railroad doing business
in Oklahoma and subject to ad valorem tax assessment
in 1982.

Further, affiant sayeth not.

/s/ Hal L. Hefner
HAL L. HEFNER

STATE OF OKLAHOMA,)
) ss
COUNTY OF OKLAHOMA.)

Subscribed and sworn to before me this 21st day of
April 1983.

/s/ Linda Hardy
Notary Public

My Commission Expires: March 27, 1985

Year

RAILROAD ASSESSMENT WORK SHEET

Company _____

SYSTEM ASSETS:

I.C.C. Acct. No.	Account or Item	
712	Material and Supplies	
736	Total Transp. Property, Less Recorded Deprec. & Amortiz.	
	Less 90% of Construction in Progress included above:	
736	Construction in Progress	x 90% =
738	Misc. Physical Property Less Recorded Deprec.	
	Leased Equipment from others, Depreciated (Schedule)	
	Less: Leased Equip. to others, Depreciated (Schedule)	
	Net Investment, Transportation Property (System)	(z)

System Operating Income Capitalized:

Op. Revenue	Year	System Op. Income	Wt.
\$		\$	1
\$		\$	2
\$		\$	3

Weighted Average Op. Income \$ _____

Weighted Average Op. Income Capitalized at 14 % _____ (x)

Allocation Factor

- (a) All Track Mileage
- (b) Main Track Mileage
- (c) Car Miles
- (d) Locomotive Miles
- (e) Traffic Units
- (f) Gross Operating Revenue
- (g) Total Investment

Average - Oklahoma Proportion _____

F.C.V. of System:

Item	Wt.	
(x)	20%	40
(z)	80%	60

System F.C.V. \$ _____ x _____ Oklahoma = Oklahoma F.C.V.

Company Returned Value

Co. Value as a % of F.C.V. _____
Co. Value \$ _____

Assessment Percentage _____
Oklahoma Assessed Valuation \$ _____

TOTAL PROPD.

ASSESSMENT \$ _____

Conference Date: _____

* Adjustment \$ _____

RECOMMENDATIONS \$ _____

OTC Hearing, Date: _____

* Adjustment \$ _____

RECOMMENDATIONS \$ _____

[Items F and G, text of 49 U.S.C. § 11503 and portion of Burlington Northern's 1980 Company Report, respectively, omitted.]

[SEAL]

OKLAHOMA TAX COMMISSION
STATE OF OKLAHOMA
2501 Lincoln Blvd.
Oklahoma City, Oklahoma 73194

James E. Walker, Chairman
John L. Garrett, Vice-Chairman
J. L. Merrill, Sec'y-Member

April 24, 1981

Honorable Tom Daxon, State Auditor and
Inspector
Secretary, State Board of Equalization
100 State Capitol Building
Oklahoma City, Oklahoma 73105

Dear Mr. Daxon:

Title 68, O.S. 1971, Section 2454, provides that:

"The Oklahoma Tax Commission shall make its findings as to the assessment of all railroad and public service corporation property; and such findings shall, on or before April 25th, of each year, be by said Commission laid before the State Board of Equalization as recommendations for its final action under Section 21, Article 10 of the Constitution. A copy of the Tax Commission's letter of transmittal of its findings shall, at such time, be furnished each member of said board.

Enclosed are lists of public service corporations, showing the findings of this Commission as to the assessment of the property of such corporations, and the same are laid before the State Board of Equalization as recommenda-

tons for its final action under Section 21, Article 10 of the Constitution.

In making these findings, the Oklahoma Tax Commission has endeavored to do all things required of it, by law, in determining the taxable value of these properties; and the findings submitted herewith represent its best judgment in that respect. It is recommended that these findings be accepted by the State Board of Equalization as to the assessment of such property for ad valorem taxation for the year 1981.

Sincerely Yours,

OKLAHOMA TAX COMMISSION

/s/ James E. Walker
JAMES E. WALKER
Chairman

/s/ John L. Garrett
JOHN L. GARRETT
Vice-Chairman

SUMMARY OF AD VALOREM ASSESSMENTS
OF THE REAL AND TANGIBLE PERSONAL
PROPERTIES OF RAILROADS AND PUBLIC
SERVICE CORPORATIONS, AS RECOMMENDED
BY THE STATE BOARD OF EQUALIZATION
BY THE OKLAHOMA TAX COMMISSION FOR
THE YEAR 1981.

Property Type	Page	Recommended Aggregate Assessments
Railroads and Airlines	2	\$ 80,127,535
Pipeline and Transmission Companies	3-5	348,427,914
Distribution Companies	6-7	813,512,005
Telephone and Tele- Communication Systems	8-9	402,205,007

OKLAHOMA TAX COMMISSION
COMPARISON OF 1980 FINAL ASSESSMENTS
WITH 1981 RECOMMENDED ASSESSMENTS
REALTY AND TANGIBLE PERSONALTY

	1980 Final	1981 Recommended	Gain or (Loss)
Railroads and Airlines	\$ 80,824,058	\$ 80,127,535	\$ (696,523)
Pipeline and Transmission Companies	333,507,702	348,427,914	14,920,212
Distribution Companies	744,578,936	813,512,005	68,933,069
Telephone and Tele-Communication Systems	367,916,309	402,205,007	34,288,698
TOTALS	\$1,526,827,005	\$1,644,272,461	\$117,445,456

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Railroads and Airlines

1. Air Midwest, Inc.
2. American Airlines, Inc.
3. The Arkansas Western Railway Company
4. The Atchison, Topeka and Santa Fe Railway Company
5. Barron Aviation Services, Inc.
6. Braniff Airways, Incorporated
7. Burlington Northern Inc.
8. Chicago, Rock Island and Pacific Railroad Company
9. Continental Air Lines, Inc.
10. Delta Air Lines, Inc.
11. Eastern Airlines, Incorporated
12. Federal Express Corporation
13. Fort Smith and Van Buren Railway Company
14. Frontier Airlines, Inc.
15. Hollis and Eastern Railroad Company
16. The Kansas City Southern Railroad Company
17. Metroflite Inc. dba Metro Airlines dba Metroflite Airlines
18. Missouri-Kansas-Texas Railroad Company
19. Missouri Pacific Railroad Company
20. Northwestern Oklahoma Railroad Company
21. Oklahoma City Junction Railway Company

	1980 Assessment	1981 Return	1981 OTC Recommendation
\$ New	\$ 114,856	\$ 114,856	\$ 114,856
16,325,973	15,410,619	15,410,619	15,410,619
24,918	24,918	24,918	24,918
21,467,950	15,881,741	20,500,450	20,500,450
7,975*	—	—	—
1,600,500	1,218,769	1,218,769	1,218,769
17,561,100 ^b	14,335,355	15,014,650	15,014,650
5,490,500	3,566,971	4,529,900	4,529,900
500,200	502,790	502,790	502,790
195,100	112,882	112,882	112,882
New	4,339	4,339	4,339
35,560	19,329	19,329	19,329
70,150	10,880	70,150	70,150
739,500	711,545	711,545	711,545
13,795	13,295	13,295	13,295
3,265,600	1,044,685	2,523,425	2,523,425
15,950*	246,911	246,911	246,911
4,319,000	3,339,715	4,283,850	4,283,850
5,797,425	3,359,085	6,255,500	6,255,500
13,200*	9,500	12,000	12,000
22,090	16,280	20,850	20,850

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	1980 Assessment	1981 Return	1981 OTC Recommendation
Railroads and Airlines			
22. Ozark Air Lines, Inc.	292,030	308,880	308,880
23. St. Louis Southwestern Railway Company	New	—	711,600
24. Sand Springs Railway Company	256,600	216,480	266,750
25. Scheduled Skyways, Incorporated	New	11,963	16,500*
26. Southwest Airlines Co.	New	1,550,000	1,705,000*
27. Texas International Airlines, Inc.	275,000*	425	330,000*
28. Texas, Oklahoma & Eastern Railroad Company	1,796,500	3,694,150	4,516,100
29. Trans Central Airlines, Inc.	126,500**	—	126,500*
30. Trans World Airlines, Inc.	463,892	477,477	477,477
31. Tulsa-Sapulpa Union Railway Company	57,050	38,689	77,700
TOTALS	\$80,824,058	\$66,242,529	\$80,127,535

Legend: * Indicates inclusion of 10% mandatory penalty for delinquency.

^a No Oklahoma property

^b Formerly St. Louis-San Francisco Railway Company.

^c Formerly Air Central, Inc.

[Additional Tables for Pipeline, Distribution, and Telephone and Telecommunication Systems Companies, Omitted.]

1981 PUBLIC SERVICE ASSESSMENT RATIOS

	Median	Mean	Class Weighted Average
Airlines	25.00%	25.18%	24.94%
Railroads	11.11	12.49	10.29
Telephones	19.66	20.25	23.46
Pipelines	27.00	27.01	27.32
Distribution	28.13	26.17	28.56

1982 Railroad and Public Service Assessment Worksheet

Railroads—Class: 1

Cons. No.	Company Name	Exception	Penalty	1981 Assessed Value	1981 Ratio	Income Capitalized %	Capitalized Amount	Original Cost %	Original Cost Amount	Net Book Value %	Net Book Value Amount
1	The Arkansas Western Railway Company	0	0	\$ 24,918	19.75		\$ 77,152			\$	129,494
2	The Atchison, Topeka and Santa Fe Railway Company	0	0	20,500,450	10.19		81,748,954				223,641,219
3	Burlington-Northern Railroad Company	0	0	15,014,650	10.99		62,834,504				168,434,881
4	Chicago, Rock Island and Pacific Railroad Company	1	0	4,529,900	12.75		—			100%	31,929,578
5	Fort Smith and Van Buren Railway Company	0	0	70,150	16.05		192,735				499,603
6	Hollis and Eastern Railroad Company	0	0	13,295	11.11		0				185,265
7	The Kansas City Southern Railway Company	0	0	2,523,425	8.25		19,741,002				35,545,996
8	Missouri-Kansas-Texas Railroad Company	0	0	4,283,850	8.27		8,129,395				78,023,621
9	Missouri Pacific Railroad Company	0	0	6,255,500	8.46		37,561,705				91,803,142
10	Northwestern Oklahoma Railroad Company	0	0	12,000	13.89		119,779				346,029
11	Oklahoma City Junction Railway Company	0	0	20,850	16.52		0				78,478
12	St. Louis Southwestern Railway Company	0	0	711,600	10.27		3,858,007				9,985,045
13	Sand Springs Railway Company	0	0	266,750	15.90		2,593,621				1,244,082
14	Texas, Oklahoma & Eastern Railroad Company	0	0	4,516,100	11.00		25,827,086				50,232,879
15	Tulsa-Sapulpa Union Railway Company	0	0	77,700	14.00		472,879				552,955

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN
OF THE OKLAHOMA TAX COMMISSION; ROBERT T.
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF
EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE
NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZA-
TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE
FISHER; and MIKE TURPEN, MEMBERS OF THE STATE
BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,
Defendants.

AFFIDAVIT OF DAVID RAY TAYLOR
IN SUPPORT OF OBJECTION OF DEFENDANT
OKLAHOMA TAX COMMISSION, TO PLAINTIFF'S
MOTION FOR TEMPORARY RESTRAINING ORDER

David Ray Taylor, having first been duly sworn de-
poses and states as follows:

1. I am Deputy Director of the Ad Valorem Tax Divi-
sion of the Oklahoma Tax Commission and I have been
employed by the division for fifteen (15) years. I have
participated in the valuation proceess within the division
whereby employees of the division received and assim-
ilated the ad valorem tax reports from railroad companies

and calculated the Oklahoma fair cash value with information therefrom, pursuant to the standard valuation formula for the involved year.

2. I have personal knowledge of the standard valuation formulas utilized by the Ad Valorem Tax Division in calculating Oklahoma fair cash value for railroads for the report years of 1975-1982, to-wit:

a. 1975 valuations were depreciated original cost of tangible assets;

b. Beginning in 1976 the formula for valuation of Oklahoma fair cash of railroads was changed to include two factors: original cost depreciated and capitalized income. The following formulas were utilized for the year indicated:

Year	Weight Assigned to Original Cost Depreciated	Capitalization Rate	Weight Assigned to Capitalized Income
1976	90%	8.50%	10%
1977	90%	8.50%	10%
1978	80%	9.50%	20%
1979	80%	10.00%	20%
1980	75%	10.50%	25%
1981	75%	11.00%	25%
1982	60%	14.00%	40%

The attached copy of graph, compliance with 4-R formula changes and pages from the 1980, 1981 and 1982 reports to the Oklahoma Legislature were prepared by the Ad Valorem Tax Division and indicate the reduction in levels of assessment of rail transportation property of the recent past.

Further, affiant sayeth not.

/s/ David Ray Taylor
DAVID RAY TAYLOR

STATE OF OKLAHOMA,)
) ss:
COUNTY OF OKLAHOMA.)

Subscribed and sworn to before me this 21st day of April, 1983.

/s/ Linda Hardy
Notary Public

My Commission expires: March 27, 1985

[Attachment, 1980 Progress Report to the Legislature on Property Revaluation, omitted.]

STATE OF OKLAHOMA
ASSESSED VALUATION OF PUBLIC SERVICE COMPANIES



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

v.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIR-
MAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T.
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF
EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE
NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZA-
TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LES-
LIE FISHER; and MIKE TURPEN, MEMBERS OF THE
STATE BOARD OF EQUALIZATION OF THE STATE OF
OKLAHOMA,

Defendants.

AFFIDAVIT OF J. L. MERRILL, SECRETARY-
MEMBER OF THE OKLAHOMA TAX COMMISSION
IN SUPPORT OF THE RESPONSE OF DEFENDANT,
OKLAHOMA TAX COMMISSION, TO THE COM-
PLAINT OF PLAINTIFF

J. L. Merrill, having first been duly sworn, deposes and
states as follows:

1. I am the Secretary-Member of the Oklahoma Tax
Commission and, as such, I have the duty to authenticate
records of official acts of the Oklahoma Tax Commission,

under the official seal of the Oklahoma Tax Commission, pursuant to 68 O.S. 1981, § 204.

2. The attached is the information upon which the Oklahoma Tax Commission officially acted to recommend a uniform, consistent acceptable appraisal basis for 1982 valuations of railroad property for ad valorem tax purposes.

Further, affiant sayeth not.

/s/ J. L. Merrill
J. L. MERRILL
Secretary-Member

STATE OF OKLAHOMA,)
) SS:
COUNTY OF OKLAHOMA.)

Subscribed and sworn to before me this 21st day of April, 1983.

/s/ Carolyn Thrift
Notary Public

My Commission Expires: 11-25-84

1981 PUBLIC SERVICE ASSESSMENT RATIOS

	Median	Mean	Class Weighted Average
Airlines	25.00%	25.18%	24.94%
Railroads	11.11	12.49	10.29
Telephones	19.66	20.25	23.46
Pipelines	27.00	27.01	27.32
Distribution	28.13	26.17	28.56

RAILROADS

Name and Sequential No.	Current Assessment (1981 O.T.C. Recom- mendation)	Cash Value (1981)	Current Ratio (1981)
3. The Arkansas Western Railway Co.	\$ 24,918	\$ 126,167	19.75%
4. The Atchison, Topeka & Santa Fe Railroad Co.	20,500,450	201,182,041	10.19
7. Burlington Northern Inc.	15,014,650	136,621,019	10.99
8. Chicago, Rock Island and Pacific Railroad Co.	4,529,900	35,528,627	12.75
13. Fort Smith and Van Buren Railway Co.	70,150	437,072	16.05
15. Hollis and Eastern Railroad Company	13,295	119,667	11.11
16. The Kansas City Southern Railway Company	2,523,425	30,586,970	8.25
18. Missouri-Kansas-Texas Railroad Company	4,283,850	51,799,879	8.27
19. Missouri Pacific Railroad Company	6,255,500	73,942,080	8.46
20. Northwestern Oklahoma Railroad Company	12,000	86,393	13.89
21. Oklahoma City Junction Railway Company	20,850	126,211	16.52
23. St. Louis Southwestern Railway Company	711,600	6,928,919	10.27
24. Sand Springs Railway Co.	266,750	1,677,673	15.90
28. Texas, Oklahoma & Eastern Railroad Company	4,516,100	41,055,455	11.00
31. Tulsa-Sapulpa Union Railway Company	77,700	555,000	14.00
TOTAL	\$58,821,138		

Chairman Nance moved that the Commission direct the Director of the Ad Valorem Division to value, as required by the applicable statute or statutes, all railroads, as a class of property, on a uniform, consistent and acceptable appraisal basis, and to return those findings to the Commission at the earliest possible time.

[Items K, L, and M, Affidavits of J.L. Merrill as to 1981 Work Sheet, Hal L. Hefner as to 1981 Self-Assessed Value, and J.L. Merrill as to 1982 Work Sheet, respectively, omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Action No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T. WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,

Defendants.

**SUPPLEMENTARY BRIEF AND STATEMENT OF
FACTS IN OPPOSITION TO MOTIONS TO DISMISS
FILED BY DEFENDANTS, OKLAHOMA TAX
COMMISSION AND ITS MEMBERS**

JAMES W. McBRIDE
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<i>Castaneda v. Partida</i> , 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed.2d 498 (1977)	11
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<i>Coulter v. Louisville & Nashville R. R.</i> , 196 U.S. 599, 25 S. Ct. 342, 49 L. Ed. 615 (1905)	6, 7
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<i>Jones v. Lee Way Motor Freight, Inc.</i> , 431 F.2d 245 (10th Cir. 1970), <i>cert. denied</i> , 401 U.S. 954, 91 S. Ct. 972, 28 L. Ed.2d 237 (1971)	11
<i>Louisville & Nashville R. R. v. Public Service Commis- sion</i> , 493 F. Supp. 162 (M.D. Tenn. 1978), <i>aff'd</i> , 631 F.2d 426 (6th Cir. 1979)	6
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

 Civil Action No. CIV-83-419-R

 BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T. WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,

Defendants.

 SUPPLEMENTARY BRIEF AND STATEMENT OF
 FACTS IN OPPOSITION TO MOTIONS TO
 DISMISS FILED BY DEFENDANTS,
 OKLAHOMA TAX COMMISSION
 AND ITS MEMBERS

STATUS OF THE PROCEEDINGS

On March 25, 1983, defendants, the Oklahoma Tax Commission and its individual members (referred to collectively as the "Commission"), filed: (1) a motion to

dismiss for want of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure; and (ii) a motion to dismiss for failure to state a claim under Rule 12(b)(6). On March 29, 1983, plaintiff, Burlington Northern Railroad Company (BN) filed its objections to the Commission's motions pursuant to Rule 14(a) of the Rules of the United States District Court for the Western District of Oklahoma. The Commission submitted a memorandum of law and seven affidavits in support of its motions to dismiss on April 21, 1983, and, on May 6, 1983, BN filed its memorandum of law in opposition.

On April 25, 1983, in a case of first impression, the United States Court of Appeals for the Tenth Circuit held the railroads must prove "purposeful overvaluation [by state officials] with discriminatory intent" in order to obtain relief under Section 306 from discriminatory overvaluation of their property.¹ *Burlington Northern R. R. v. Lennen*, 715 F.2d 494, 498 (10th Cir. 1983). On August 30, 1983, this Court directed the parties to file briefs addressing the effect of *Burlington Northern R. R. v. Lennen* upon this litigation. BN and the Commission filed such briefs on September 14, 1983.

On October 13, 1983, BN sought leave to amend its complaint to include the requisite allegations of intent. This Court granted leave to amend on November 3, 1983, and, on November 9, 1983, BN amended its complaint to allege that the defendants had purposefully overvalued

¹ This evidentiary requirement originated with the Tenth Circuit; it is not set forth in the statutory language of Section 306. BN contends that the Tenth Circuit's decision to require proof of discriminatory intent in Section 306 cases is erroneous and has petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court has issued an order requiring the Solicitor General of the United States to file a brief on the question of whether *Burlington Northern R. R. v. Lennen* was correctly decided and expressing the views of the United States on the issues raised by the petition. The Solicitor General has not yet filed his brief.

BN's property for the 1982 assessment year with discriminatory intent.

On November 17, 1983, counsel for the Commission requested a meeting in chambers among counsel and the Court to discuss, *inter alia*, the status of the Commission's 12(b)(1) motion to dismiss. Counsel for the Commission asserted that it was entitled to a ruling on this motion because, in the Commission's view, no facts exist which would tend to show purposeful overvaluation of BN's property with discriminatory intent for the 1982 assessment year. Counsel for BN disagreed and contended that: (1) the facts demonstrate a clear case of intentional overvaluation; (ii) BN should be permitted to proceed with discovery; and (iii) because the issue of discriminatory intent is inextricably interwoven with the merits of the case, final resolution of the jurisdictional question should be postponed until the trial on the merits. By Minute Entry dated November 17, 1983, this Court: (i) fixed a schedule for the completion of discovery; (ii) directed BN to submit a statement setting forth facts which, in BN's view, establish jurisdiction in this case under the standard of *Burlington Northern R. R. v. Lennen*, and (iii) directed the Commission to file a response.

On February 24, 1984, counsel for BN requested a telephone conference among all counsel and the Court to discuss the procedure that will govern the resolution of the Commission's 12(b)(1) motion to dismiss.² Counsel for BN contended that the Commission's 12(b)(1) motion should, at this stage of the proceedings, be treated as a motion for summary judgment and be governed by Rule 56. Counsel for the Commission contended other-

² Counsel for BN and the Commission are agreed that the Commission's 12(b)(6) motion to dismiss for failure to state a claim must be treated as a motion for summary judgment if matters outside the pleadings, such as the Commission's affidavits, are considered by the Court.

wise. This Court further directed the parties to brief the issue of procedure.

This memorandum of law and statement of facts is, therefore, submitted by BN in compliance with this Court's directives of November 17, 1983, and February 24, 1984.

PROCEDURE GOVERNING THE COMMISSION'S MOTION TO DISMISS UNDER RULE 12(b)(1)

At this stage of the proceedings, the Commission's 12(b)(1) motion should be treated as a motion for summary judgment and be governed by the standards of Rule 56. The only question before the Court should be: do the pleadings, depositions, answers to interrogatories and affidavits on file raise a genuine issue of material fact with regard to the Commission's intent in assessing BN's property for the 1982 assessment year?

A 12(b)(1) motion to dismiss may attack a complaint for failure to allege the requisite jurisdictional facts, or it may attack plaintiff's ability to prove factually that jurisdiction exists as alleged in the complaint. *See Wright & Miller, Federal Practice & Procedure: Civil*, § 1350, p. 549 (1969). The Commission's 12(b)(1) motion in this case is of the latter type; the Commission questions BN's ability to prove that the Commission purposefully overvalued BN's property with discriminatory intent for the 1982 assessment year.

Many of the facts bearing on the jurisdictional issue in this case, e.g., facts regarding the assessment procedures actually utilized by the Commission and its staff in fixing BN's 1982 assessment, also bear on the merits of BN's Section 306 claim. In *Baker v. Hunn Roofing, Inc.*, 399 F.Supp. 628 (W.D. Okl. 1975), Chief Judge Daugherty outlined the procedure that should be followed where jurisdiction is challenged under 12(b)(1) and

where issues of fact exist which pertain to both the Court's jurisdiction and the merits of the plaintiff's claim. Judge Daugherty held that, under such circumstances, the trial court should (i) treat the 12(b)(1) motion as a motion for summary judgment, or (ii) reserve the question of jurisdiction for the trial on the merits.

In *Schramm v. Oakes*, 352 F.2d 143 (1965), the Tenth Circuit approved of this procedure and observed that the purpose of deferring final resolution of jurisdictional questions until trial (unless there are no genuine issues of material fact pertaining to jurisdiction) is "to prevent a summary disposition on the merits without the ordinary incidents of a trial. . . ." 352 F.2d at 149. Where jurisdiction is challenged under Rule 12(b)(1), plaintiffs must be afforded an opportunity to develop, present and argue the facts in a manner that is adequate in the context of the disputed issues in evidence. *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L. Ed.2d 212 (1981).

Although federal district courts have broad discretion in resolving 12(b)(1) motions, both fairness and analogy to Rules 12(b)(6) and 56 require that the parties be given an opportunity to litigate their factual dispute; the courts must take evidence on factual issues pertaining to jurisdiction if the parties' affidavits do not suffice to eliminate all genuine issues of material fact. *Gordon v. National Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982); *Mortensen v. First Federal Savings & Loan Association*, 549 F.2d 884, 891 (3rd Cir. 1977). *See also*, *Budde v. Ling-Temco-Vought, Inc.*, 511 F.2d 1033 (10th Cir. 1975 (where defendant moves to dismiss for lack of personal jurisdiction, both parties should be allowed discovery on factual issues raised by the motion)).

BN submits the following memorandum and statement of facts for the purpose of showing that genuine issues of material fact exist with respect to the question of dis-

criminatory intent and that the Commission's 12(b) (1) motion should be denied.³

ARGUMENT AND FACTS IN OPPOSITION TO
THE COMMISSION'S MOTION TO DISMISS
UNDER RULE 12(b) (1)

A. Methods Of Proving "Purposeful Overvaluation With Discriminatory Intent."

In *Burlington Northern R. R. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), the court of appeals held that a railroad seeking relief under Section 306 from discriminatory overvaluation of its property by state officials must "make a strong showing of purposeful overvaluation of [its] property with discriminatory intent. . . ." 715 F.2d at 498. The court of appeals did not, however, trace the legal antecedents of this evidentiary requirement or discuss the means by which "purposeful overvaluation with discriminatory intent" might be proven.

Prior to the effective date of Section 306, railroads frequently sought relief in federal court from discriminatory state ad valorem taxation under the equal protection clause of the fourteenth amendment to the United States Constitution. See, e.g., *Great Northern Ry v. Weeks*, 297 U.S. 135, 56 S. Ct. 426, 80 L. Ed. 532 (1936); *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102, 55 S. Ct. 55, 79 L. Ed. 222 (1934); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 430 (1923); *Chicago, Burlington & Quincy Ry. v. Babcock*, 204 U.S. 585, 27 S. Ct. 326, 51 L. Ed. 636 (1907); *Coulter v. Louisville & Nashville R. R.*, 196 U.S. 599, 25 S. Ct. 342, 49 L. Ed. 615 (1905); *Louisville & Nashville R. R. v. Public Serv-*

³ This memorandum should not be construed as a request by BN for findings of jurisdictional facts by this Court or as a submission by BN of its case on brief. If this Court intends to decide the jurisdictional facts, BN respectfully requests an evidentiary hearing at which it will have an opportunity to make a complete record and at which this Court will decide the factual issues by a preponderance of the evidence.

ice Commission, 493 F. Supp. 162 (M.D. Tenn. 1978), *aff'd*, 631 F.2d 426 (6th Cir. 1979); *Louisville & Nashville R. R. v. Public Service Commission*, 249 F. Supp. 894 (M.D. Tenn. 1966), *aff'd* 389 F.2d 247 (6th Cir. 1968).

These fourteenth amendment cases involve ad valorem tax discrimination arising from a variety of sources, e.g., discrimination caused by the overvaluation of railroad property (*Great Northern Ry.*, *supra*, *Rowley*, *supra*, and *Sioux City Bridge Co.*, *supra*), by the undervaluation of non-railroad property (*Louisville & Nashville R. R.* cases) or by a combination of both factors (*Chicago, Burlington & Quincy Ry.*, *supra*, and *Coulter*, *supra*). In each of these cases, the court required the complaining railroad to prove that the tax discrimination at issue, regardless of its source, was "purposeful," or "systematic and intentional." As stated in *Southland Mall, Inc. v. Garner*, 455 F.2d 887, 889 (6th Cir. 1972):

The element which [a taxpayer] must always prove [in order to establish an equal protection violation] is that he has been a victim of "intentional and arbitrary discrimination whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S. Ct. 459, 62 L. Ed. 1154 (1918);

. . . .

In explaining the intention which must be shown, the Supreme Court has stated: "There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity." *Rowley v. Chicago & Northwest Railway*, 293 U.S. 102, 111, 55 S. Ct. 55, 59, 79 L. Ed. 222 (1934).

. . . .

While taxpayers have normally prevailed on equal protection claims only when they were able to demonstrate a systematic pattern of discrimination . . .

such a systematic pattern does not appear to be an essential element of the claim. See *Snowden v. Hughes*, 321 U.S. 1, 9-10, 64 S. Ct. 397, 88 L. Ed. 497 (1944). Thus clear proof that a tax was discriminatorily aimed at a single taxpayer has been held to support an equal protection claim. *McFarland v. American Sugar Company*, 241 U.S. 79, 36 S. Ct. 498, 60 L. Ed. 899 (1916).

The evidentiary requirement of "intentional discrimination" in federal equal protection cases is, by its terms, indistinguishable from the evidentiary requirement of "purposeful overvaluation with discriminatory intent" as defined in *Burlington Northern R. R. v. Lennen*.⁴ Thus, federal equal protection decisions which address issues of state tax discrimination and which antedate the passage of Section 306 offer some guidance as to how discriminatory intent may be proven under the *Burlington Northern R. R. v. Lennen* standard.

Certain general principles are apparent from a review of federal fourteenth amendment cases attacking the validity of state tax assessments:

First, purposeful, or systematic and intentional, discrimination may be proven by direct evidence or inferred from circumstantial evidence. As stated in *Southland Mall, Inc., supra*:

Assuming, as we must, that public officials rarely admit wrong doing we must accept circumstantial evidence of improper intention.

455 F.2d at 891.

⁴ In *Burlington Northern R. R. v. Lennen, supra*, and in *Atchison, Topeka & Santa Fe Ry. v. Lennen*, 640 F.2d 255 (10th Cir. 1981), the Tenth Circuit acknowledged that Section 306 is remedial legislation. 715 F.2d at 496-97; 640 F.2d at 259. In view of this acknowledgment, it cannot be argued that the Tenth Circuit, by requiring proof of discriminatory intent in Section 306 valuation cases, intended to impose any greater evidentiary burden upon railroads than railroads would have to bear in the absence of Section 306.

Second, although mere "errors of judgment" resulting in overvaluation do not, standing alone, support a claim of purposeful discrimination, *Rowley v. Chicago & N. W. Ry.*, 293 U.S. at 111; *Soiux City Bridge Co. v. Dakota County*, 260 U.S. 447; *Chicago, Burlington & Quincy Ry. v. Babcock*, 204 U.S. at 598; *Southland Mall, Inc. v. Garner*, 455 F.2d 889, a failure to use proper valuation methods, or a persistent disregard on the part of state officials for known conditions essential to a just determination of value, constitute strong circumstantial evidence of intentional discrimination. *Great Northern Ry. v. Weeks*, 197 U.S. at 151; *Cumberland Coal Co. v. Board of Revision of Tax Assessment*, 284 U.S. 23, 52 S. Ct. 48, 76 L. Ed. 146 (1931); *Bailey v. Megan*, 102 F.2d 651 (8th Cir. 1939).

In *Great Northern Ry., supra*, the Supreme Court inferred purposeful discrimination from the fact that state taxing authorities disregarded changed business conditions which substantially affected the railroads' value, e.g., substantial declines in traffic and revenue and increased competition for new methods of transportation. In *Cumberland Coal Co., supra*, the United States Supreme Court held that intentional discrimination could be inferred where county assessors assessed all coal lands in the county at the same valuation and ignored differences in the assessability, transportability and value of various types of coal subject to assessment. In *Bailey, supra*, the Eighth Circuit inferred discriminatory intent primarily from the fact that state taxing authorities had refused to lower railroad values significantly despite a substantial downward trend in the income indicators of value that the state had historically used to estimate value.

Third, differences in valuation methodology among taxpayers of the same class, or recent alterations in valuation methodology which substantially affect the resulting value, also indicate purposeful discrimination. For example, in *Raymond v. Chicago Union Traction Co.*, 207

U.S. 20, 28 S. Ct. 7, 52 L. Ed. 78 (1907), the court inferred discriminatory intent from the fact that county officials had assessed railroad property at a different rate, and by a different method, from that which had been employed by those officials for other corporations of the same class for the same year. In *Burlington Northern R. R. v. Lennen*, the Tenth Circuit relied upon the absence of any changes in the procedures utilized by the state to value railroad property as an indication that the state had not intentionally discriminated against the railroads in that case. 715 F.2d at 498.

Fourth, and perhaps most significant for purposes of this case, an historical pattern of systematic and intentional discrimination against a particular taxpayer, or class of taxpayers, raises the inference that state officials intended to practice the same sort of discrimination for the tax year in question. See, e.g., *Louisville & Nashville R.R. v. Public Service Comm.*, 249 F.Supp. 894, 902 (M.D. Tenn. 1966).

These principles of proof are identical to those employed by federal courts in racial discrimination cases under the fifth and fourteenth amendment amendments to the United States Constitution, and in actions under Title VII of the Civil Rights Act of 1964, alleging disparate racial treatment. These cases (like Section 306 valuation cases as interpreted by the Tenth Circuit) require proof of discriminatory intention. Discussing the methods by which a racially discriminatory purpose might be proven, the United States Supreme Court stated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L.Ed. 2d 450 (1977):

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of

the official action—whether it “bears more heavily on one race than another,” . . .—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125 (1960) or *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (1886), impact alone is not determinative, and the Court must look to other evidence.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . The specific sequence of events leading up [sic] the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

429 U.S. at 266-68; 97 S. Ct. at 564-65 [footnotes omitted].

In *Columbus Board of Education v. Penick*, 443 U.S. 449, 464-65, 99 S. Ct. 2941, 2950, 61 L.Ed.2d 666, 680-681 (1979), the Supreme Court held that adherence to a specific policy or practice with full knowledge of the predictable effect raises an inference of intent. Finally, in *Washington v. Davis*, 426 U.S. 229, 241, 96 S. Ct. 2040, 2048, 48 L.Ed.2d 597, 608 (1976), the Supreme Court observed that, particularly where government action is involved, the most probative evidence of intent is

objective evidence of what actually occurred.⁵ See also, *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 401 U.S. 954, 91 S. Ct. 972, 28 L. Ed.2d 237 (1971).

Applying such principles of proof to this case, BN contends that this Court may infer "purposeful overvaluation with discriminatory intent" from the following facts and that summary judgment is, therefore, improper.

B. Facts Of This Case Which Demonstrate "Purposeful Overvaluation With Discriminatory Intent"

1. An Overview Of The Facts

The Commission has practiced systematic and intentional tax discrimination against railroads for many years. Historically, the Commission has disregarded the fundamental principle of uniformity in taxation, has failed to use proper valuation methods, and has ignored known conditions essential to a just determination of value. The Commission has been result-oriented, i.e., the Commission's principal concern has been to maintain aggregate assessments of railroad (and other public utility) property at a high level relative to those of locally-assessed property irrespective of the true market value of railroad property, and with full knowledge of wide disparities in assessment levels among railroads and between railroads and other taxpayers.

For the 1982 assessment year, the Commission once more assessed railroad property without regard for

⁵ As in fourteenth amendment tax cases, evidence of open statements by the defendant of an intent to discriminate is not necessary to prove a civil rights violation. *Denney v. Hutchinson Sales Corp.*, 649 F.2d 816, 822 (10th Cir. 1981). Similarly, mere protestations of a lack of discriminatory intent, or affirmations of good faith, will not suffice to rebut a *prima facie* case of discrimination. *Castaneda v. Partida*, 430 U.S. 482, 499 n.19, 97 S. Ct. 1272, 1282, 51 L. Ed.2d 498 (1977).

proper valuation methodology or for known conditions essential to a just determination of value. Prior to 1982, the Commission had made no attempt whatsoever to assess all railroads at the same percentage of true market value, or to assess all railroads at the same percentage of true market value as other property. In 1982 the Commission decided to comply with Section 306 and to assess railroad property at the assessment percentage applicable to "all other commercial and industrial property." However, the Commission's principal objective in 1982, as in prior years, was to maintain aggregate railroad assessments at or near the prior year's level.

Although the Commission applied the commercial and industrial assessment percentage to all railroads in 1982, it concurrently, and substantially, altered the valuation methodology which had purportedly formed the basis for its assessments of railroad property in 1979, 1980 and 1981. By altering valuation methodology, the Commission achieved substantially higher values than those that had formed the basis of its assessments for 1981 (70% higher in the case of BN). By manipulating railroad values, the Commission achieved aggregate railroad assessments for 1982 only slightly lower than those for 1981. By manipulating BN's 1982 value, the Commission achieved a 1982 assessment for BN which was: (i) only slightly lower than the Commission's assessment for BN for 1981, and (ii) significantly higher than BN's 1982 assessment would have been if the Commission had applied Section 306 as it is written, i.e., if the Commission had determined the true market value of BN's property in Oklahoma and applied the commercial and industrial assessment percentage of 10.87%. In short, the Commission was unwilling to appraise railroad property at true market value, assess it at the commercial and industrial percentage, and let the chips fall where they may. The Commission was as result-oriented in 1982 as it had been in past years.

2. Specific Facts Which Demonstrate Discriminatory Intent *

a. Assessment Years 1967 to 1973

For the assessment years 1967 through 1973, the Commission's assessments of railroad property were not based upon true market value. During this period, the Director of the Ad Valorem Tax Division of the Commission ("Director"), Mr. J. L. Merrill, made no "zero-based" appraisals of railroad property, i.e., he made no attempt to determine the true market value of each railroad's property as of the assessment date. The Director arrived at a proposed assessment for a particular railroad merely by adjusting the previous years' assessment upward (for such additions and betterments as had occurred during the calendar year prior to the assessment date) and downward (for such retirements as had occurred during the same calendar year). Merrill Dep., 14:15-17; 15:7-14; 36:1-7.

During this period, the Director routinely held informal conferences with railroad tax managers prior to recommending an assessment to the Commission. As a result of such conferences (at which the railroad tax managers usually expressed their opinion as to the correct value of, and methods of valuing, railroad property) the Director would occasionally "adjust" his proposed assessment. *Ibid.*, 14:10-16; 16:21-24; 17-19:1-3.

The Director recognized that, during the period 1967 to 1973, railroad values were declining as a result of economic conditions, and that assessments of railroad property were probably too high relative to those imposed on other property. *Ibid.*, 20:16-25; 21-22:1-12.

* Citations to depositions indicate the deponent, page number, and beginning and ending lines. For example, a reference to page 14, lines 14 through 22 of the deposition of J. L. Merrill is cited at "Merrill Dep., 14:14-22."

Although the Director established a deliberate policy of lowering aggregate railroad assessments slightly each year, he did so without any knowledge of the true market value of any particular railroad's property; his assessment for a particular railroad remained an "extrapolation" of the prior year's assessment. *Ibid.*, 18:18-24; 21:18-13; 31; 32; 33.

During this period, neither the Director nor the Commission made any attempt to apply a uniform assessment ratio to railroad property; they failed to do so even though Commission conducted annual ratio studies by which the prevailing level of assessment among non-utility properties could have been easily computed. *Ibid.*, 22; 61.

The Director occasionally monitored "assessment ratios" for each railroad; however, because the Director had never seriously attempted to ascertain the true market value of any railroad, these "assessment ratios" were not assessment ratios in the true sense, i.e., they were *not* ratios of assessed value to true market value. The Director's "assessment ratio" for each railroad was nothing more than the number derived by dividing a particular railroad's assessment (which had been adjusted or negotiated in conference) by its "value" (which was based upon book adjustments to the previous year's assessment). *Ibid.*, 22; 23:24-25.

b. Assessment Years 1973 Through 1978

In February, 1973, Mr. Merrill was appointed to the Commission to serve as its Secretary-Member (a position which he holds at present). His successor as Director was Mr. Louis H. Bohr. Mr. Merrill trained Mr. Bohr for the position of Director, guided Mr. Bohr through the assessment process for the 1973 assessment year, and closely supervised his performance for a short time thereafter. *Ibid.*, 25-27.

Mr. Bohr inherited both the railroad assessment numbers and the assessment technique of his predecessor, i.e., Mr. Bohr's railroad assessments were based primarily upon the prior year's assessment as adjusted for such additions and betterments as had occurred during the preceding year. As a consequence, Mr. Bohr's assessments, like those of his predecessor, bore no particular relationship to true market value. *Ibid.*, p. 26.

Like his predecessor, Mr. Bohr also held informal conferences with individual railroad tax managers prior to submitting his recommended assessments to the Commission. At these conferences, Mr. Bohr and the railroad tax manager would review an assessment worksheet that Mr. Bohr had prepared beforehand setting out, *inter alia*: (i) the railroad's assessment for the previous assessment year; (ii) the railroad's total additions and betterments for the previous calendar year; and (iii) the railroad's total net investment as shown on its books of account (i.e., the railroad's net book cost). Mr. Bohr, like his predecessor, occasionally "adjusted" his proposed assessment during conference. The amount of the adjustment was usually memorialized on the railroad's worksheet. Wehner Affidavit, filer March 1, 1984, Ex. 1.

In 1977, Mr. Bohr began to compute an income indicator of value for each railroad that he assessed and to depict this computation on his assessment worksheet. According to one of Mr. Bohr's principal assistants, Mr. David Taylor, Mr. Bohr's objective in computing an income indicator was to begin the process of bringing Oklahoma's railroad assessments into compliance with Section 306. In Mr. Taylor's words, Mr. Bohr believed the Section 306 required Oklahoma to: (i) make "more reasonable appraisal[s]" of railroad property than had been made in the past, and (ii) apply a lower assessment percentage to railroad valuations than had been applied in Oklahoma, 17:15-25.

Mr. Bohr did not, however, place principal reliance upon the income indicator of value. His apparent intention was to "phase-in" his income indicator by giving it only 10% weight relative to his net book cost indicator for 1977 and 1978 and to gradually increase the weight placed upon capitalized income in future years. According to Mr. Taylor, Mr. Bohr's decision to phase-in an income indicator over a period of years was influenced by the revenue requirements of the counties. Mr. Bohr believed that the counties simply could not afford the reduction in railroad tax revenue that would result if railroads were assessed suddenly—and primarily—on the basis of capitalized income. *Ibid.*, 21:20-25; 22:1-21; 30:10-14; Bohr, 14; 64:23-25; 88:16-22.

c. Assessment Years 1979 Through 1981

At informal conferences with BN's railroad tax manager for each of the assessment years 1979 through 1981, Mr. Bohr represented that he had determined his assessment for BN [and the assessment of BN's predecessor company, The St. Louis and San Francisco Railway Company ("Frisco")] by the following procedure: (i) Mr. Bohr first estimated a full system value for the railroad by deducting from net book cost an amount attributable to functional and economic obsolescence;⁷ (ii) Mr. Bohr next allocated a percentage of this full system value to the State of Oklahoma; and (iii) Mr. Bohr then assessed this allocated value by a specific assessment percentage (23.5% in 1979, 21.75% in 1980, and 19% in 1981). These data and computations were memorialized by Mr. Bohr in writing, with copies furnished to BN's tax manager, Mr. T. C. Wehner, Wehner Affidavit filed March 1, 1984, Exs. 5, 6, 7.

⁷ Mr. Bohr granted Frisco obsolescence of 40% of net book cost for 1979 and 45% of net book cost for 1980; he granted BN obsolescence of 50% of net book cost for 1981. Wehner Affidavit filed March 1, 1984, Exs. 5, 6, 7.

During one or more of these conferences, Mr. Bohr admitted that Oklahoma's railroad assessments were higher than they should be. Mr. Bohr also stated that, while he could not reduce railroad assessments to the proper level all in one year, his objective was ultimately to reduce railroad assessments to a "more reasonable" level and to bring them into conformity with the requirements of Section 306. *Ibid.*, ¶ 8.

After Mr. Bohr had completed his informal conferences with railroad tax representatives and had made whatever adjustments to railroad assessments that he saw fit, he presented his recommended assessments to the Commission for approval. Mr. Bohr's recommendations were set forth on documents which showed: (i) the current year's recommended assessment for each railroad; (ii) the prior year's assessments for each railroad; (iii) aggregate assessments of railroads and airlines as a class for the current year and for the prior year; and (iv) the net gain or loss in aggregate assessments from the prior year. See, e.g., Transmittal Letter of April 24, 1981, from the Commissioner to the State Board (Appendix H to the Commissioner's Brief in Support of its Motion to Dismiss filed April 21, 1983).

In presenting his proposed assessments of railroad property to the Commission, Mr. Bohr did not furnish the Commission with any supporting documentation; the Commission did not, as a routine matter, review any of Mr. Bohr's assessment worksheets, conference memoranda, or valuation data. The Commission routinely accepted Mr. Bohr's proposed assessments and forwarded them to the State Board as the Commission's recommendation. Merrill, 37-41.

For each railroad that he assessed, Mr. Bohr prepared a document entitled "Oklahoma Compliance, Railroad Revitalization and Regulatory Reform Act of 1976." These documents, which were compiled by members of Mr. Bohr's

staff for each assessment year since 1975, showed the following information for each railroad: (i) Mr. Bohr's net book cost and income indicators of value; (ii) Mr. Bohr's estimate of the railroad's full system value; (iii) the Oklahoma allocation percentage; (iv) the railroad's allocated Oklahoma value; (v) the railroad's assessment; and (vi) the railroad's "ratio." Mr. Bohr usually furnished copies of Frisco's (or BN's) compliance sheet to BN's tax manager. Although Mr. Bohr also maintained copies of these "compliance sheets" in Commission files, the Commission did not examine them in deciding whether to accept Mr. Bohr's recommended assessments. Wehner Affidavit filed March 1, 1984, Exs. 8, 9, 10, 11; Merrill, 54-56.

The "compliance sheets" that Mr. Bohr furnished BN's tax manager differ slightly from the "compliance sheets" contained in the Commission's files. (Compare entries on the line for 1981, Wehner Affidavit filed March 1, 1984, Ex. 10, with entries on the line for 1981, Merrill Affidavit, Ex. K. to the Commission's Brief in Support of its Motion to Dismiss filed April 21, 1983). Furthermore, Mr. Bohr's "compliance sheets" show multiple, and widely disparate, entries for many of the same items. For example, the "compliance sheet" attached to Merrill Affidavit, Ex. K., shows multiple "system values" for BN for 1979, multiple "Oklahoma values" for BN for 1979 and 1981, and multiple "ratios" for 1979 and 1981.

These documents suggest that, notwithstanding his representations in conference to BN's tax manager, Mr. Bohr was (as late as 1981) assessing railroad property on the basis of what he perceived to be an "acceptable" or "reasonable" assessment, rather than on the basis of bona fide estimates of true market value. Indeed, Mr. Bohr admitted on deposition in this case that, in making his assessments of railroad property, he was not particularly concerned with valuation methodology or with applying the correct assessment percentage. Bohr, 31:17-24; 33:4-5. Mr. Bohr's principal concern, by his own ad-

mission, was merely to arrive at an assessment which would generate sufficient revenue and be acceptable to the railroad taxpayer. Bohr, 64:5-6; 88:16-22. In short, Mr. Bohr worked the assessment process in reverse. He first determined what would be an acceptable assessment for a particular railroad in a given year; he then adjusted his "indicators of value" in conference with railroad tax managers and mollified the managers with assurances of further reductions.

d. The 1982 Assessment Year

Two new Commissioners assumed office in late 1981. Mr. Odie Nance was appointed to the Commission as Chairman and Mr. Robert Wadley was appointed as the third member. Nance, 3:20-25; 4:1-19; Wadley, 3:22-25; 4:1-11.

These gentlemen were apparently dissatisfied with Mr. Bohr's performance as Director and objected to his practice of conferring informally with railroad tax representatives (even though this procedure had been followed for over fifteen years). The Commission directed Mr. Bohr to discontinue informal tax conferences for the 1982 assessment year and, in late March 1983, directed him generally to assess railroad property for the 1982 assessment year in a "uniform and consistent manner." Nance, 28:17-25; 25-30:1-17.

At about the same time, Mr. Merrill requested Mr. Bohr to furnish the Commission with information concerning the relative levels of assessment of each of the fifteen railroads operating within Oklahoma. The purpose of this request was to determine the degree of variation among railroad assessments. Merrill, 46-46

Mr. Bohr furnished the Commission with a document entitled "Railroads," which showed the assessment, the 1981 Oklahoma fair cash value, and the assessment "ratio" for each railroad in the State for 1981. The as-

essment "ratios" depicted on this document varied widely, ranging from a low of 8.25% to a high of 19.75%.⁸ See Merrill Affidavit, Ex. J to Commission's Brief in Support of its Motion to Dismiss filed April 21, 1983.

Also in March, 1983, the Commission decided to comply for the first time with the requirement of Section 306 that a railroad property be assessed at the same assessment percentage applicable to "all other commercial and industrial property." Although the Commission had conducted ratio studies annually for many years prior to 1982 and was aware of the average level of assessment of commercial and industrial property in the state, the Commission had never before used the commercial and industrial assessment percentage in determining railroad assessments. Merrill, 49:61-63.

The Commission was, however, concerned with the effect which its decision to use the commercial and industrial assessment would have on aggregate railroad assessments. Before deciding upon the assessment ratio that it would apply to railroads for the 1982 assessment year, the Commission wanted to insure that aggregate railroad assessments for 1982 would not fall significantly

⁸ In truth, this document revealed absolutely nothing about the prevailing level of assessment of railroad property in Oklahoma, or about the relative levels of assessment among the railroads. Because Mr. Bohr's 1981 assessments were merely negotiated numbers which bore no particular relationship to true market value, the "ratios" shown on this document were not true assessment ratios, i.e., they did not reflect the actual percentage of *true market value* at which the railroad's property had been assessed. These "ratios" were computed ratios; they were derived merely by dividing Mr. Bohr's 1981 assessment (after adjustment in conference) by his *unadjusted* 1981 "value" allocated to the State of Oklahoma. Furthermore, the 1981 "ratio" depicted on this document for BN (10.99%) is far different from the assessment percentage (19%) that, according to Mr. Bohr's statements to Mr. Wehner, had been used in 1981 to compute BN's assessment. Compare Wehner Affidavit, Ex. 7, with the "Railroads" document.

below 1981 levels. In March or April of 1982, the Commission asked its Economic Research Section "to devise a range of ratios" for railroads and public service companies for the 1982 assessment year that "would be such as to *not* cause a decrease in total assessed value for the assessment year 1981." [Emphasis added]. Memorandum of Reece Womack, April 23, 1982, Ex. A to Commission's Brief in Support of its Motion to Dismiss filed April 21, 1983. The Commission also requested that its Economic Research Section develop a single ratio for railroads and public service companies "that would *not* result in a decrease in total 1981 assessed value." *Ibid*.

Before railroad assessments for the 1982 assessment year were finalized, Mr. Bohr was relieved as Director. Bohr, 42; 68. Since he had been directed by the Commission to hold no informal conferences with railroad tax representatives, Mr. Bohr made none of the substantial adjustments for obsolescence that he had made during each of the three previous assessment years. He submitted to the Commission only the unadjusted indicators of value set forth on his 1982 worksheets. The Commission, in turn, applied the assessment percentage applicable to commercial and industrial property (10.87%) to Mr. Bohr's *unadjusted* indicators of value. Wehner, Affidavit filed March 1, 1984, ¶ 11.

By failing and refusing to adjust, or reduce, Mr. Bohr's net book value indicator for obsolescence inherent in railroad assets (as Mr. Bohr had done historically), the Commission grossly overvalued BN's property for 1982.⁹

⁹ BN contends that the true market value of its system property for the 1982 assessment year is \$1,495,253,000.00. The "full system value" which forms the basis of the Commission's 1982 assessment is \$3,574,921,544.00. For purposes of this litigation, the Commission has hired an outside appraiser, Mr. Michael W. Goodwin, who has estimated the full system value of BN for 1982 at \$3,400,000,000.00. Mr. Goodwin is the former Chief of the Public Service Appraisal Bureau, Division of Property Valuation, Kansas

By substantially altering the valuation methodology that (at least as represented by Mr. Bohr to BN's tax manager) had been used to estimate BN's full system value for 1979, 1980 and 1981, the Commission was able to give the appearance of complying with Section 306 and, at the same time, to fulfill its primary objective of maintaining aggregate railroad assessments at or near 1981 levels.¹⁰

CONCLUSION

It should be emphasized that no Section 306 valuation case, including *Burlington Northern R. R. v. Lennen*, has been dismissed for want of subject matter jurisdiction. *Burlington Northern R. R. v. Lennen* is merely the denial of the railroad's application for a preliminary injunction; that decision did not preclude the railroads from proceeding to a trial on the merits under the *Lennen* standard. In *Missouri Pacific R. R. v. Mauer*, No. CI 82-C-1445 (1982), D.C. Colo.), a case which involves both valuation and equalization issues under Section 306, the district court denied the State's 12(b)(1) motion and reserved the question of subject matter jurisdiction until trial.

BN respectfully submits that the facts and inferences outlined in this memorandum raise a genuine issue of material fact regarding the intent of the Commission in

Department of Revenue. As such, Mr. Goodwin developed the indicators of value used by the Kansas Department of Revenue to assess BN for ad valorem tax purposes for 1981; Mr. Goodwin's 1981 investment indicator adjusted for obsolescence was \$1,898,367,327; his 1981 market indicator for BN was \$2,282,873,444; his highest 1981 capitalized income indicator for BN was \$1,905,342,506. BN submits that Mr. Goodwin's 1982 appraisal of BN, which fixes BN's value at nearly *twice* the value which he himself estimated in 1981, is not credible. Goodwin, —.

¹⁰ The Commission's recommended assessments of railroad property for 1981 totalled \$58,821,138. The Commission's recommended assessments of railroad property for 1982 totalled \$57,134,234. Exhibits B and J, Commission's Brief In Support of its Motion to Dismiss filed April 21, 1983.

valuing BN's property for the 1982 assessment year. The Commission's 12(b)(1) and 12(b)(6) motions to dismiss should be, therefore, be denied.

Respectfully submitted,

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[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-83-419-R

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,
vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN
OF THE OKLAHOMA TAX COMMISSION; ROBERT T.
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF
EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE
NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZA-
TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE
FISHER; and MIKE TURPEN, MEMBERS OF THE STATE
BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,
Defendants.

**RESPONSE OF DEFENDANTS TO PLAINTIFF'S
SUPPLEMENTARY BRIEF AND STATEMENT
OF FACTS IN OPPOSITION TO THE MOTION TO
DISMISS OF THE OKLAHOMA TAX COMMISSION**

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TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE
FISHER; and MIKE TURPEN, MEMBERS OF THE STATE
BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,
Defendants.

RESPONSE OF DEFENDANTS TO PLAINTIFF'S
SUPPLEMENTARY BRIEF AND STATEMENT OF
FACTS IN OPPOSITION TO THE MOTION TO
DISMISS OF THE OKLAHOMA TAX COMMISSION

Defendants, Oklahoma Tax Commission (OTC) and
State Board of Equalization (State Board), submit to the
Court the following response to Plaintiff's, Burlington
Northern Railroad Company (BN), Supplementary Brief
and Statement of Facts in Opposition to the Motion to
Dismiss of the Oklahoma Tax Commission.

STATEMENT OF THE CASE

Burlington Northern filed its complaint herein on
March 3, 1983, alleging overvaluation of BN's taxable
Oklahoma property for the 1982 ad valorem tax assess-
ment. BN alleged this overvaluation violated 49 U.S.C.
§ 11503, also referred to as "Section 306" of the Rail-
road Revitalization and Regulatory Reform Act of 1976,
by a de facto assessment ratio which exceeded the permis-
sible variance from that ratio used in assessing other
commercial and industrial property in Oklahoma for ad
valorem tax purposes.

BN *did not* contest the allocation factor whereby a
portion of BN's entire railroad system was allocated to
Oklahoma for ad valorem tax purposes.

BN *did not* contest the assessment ratio, 10.87%, de-
termined to be the statewide average assessment ratio
for assessing commercial and industrial property in 1981
by the various county assessors in this State.

BN complains *solely* that the valuation or full market
value put upon its taxable property as of January 1, 1982
violates 49 U.S.C. § 11503.

OTC filed its Motion to Dismiss on March 25, 1983,
pursuant to Rule 12(b)(1) of the Federal Rules of Civil
Procedure, asserting lack of subject matter jurisdiction
of the federal district courts, under 49 U.S.C. § 11503
and 28 U.S.C. § 1341, to hear pure valuation or de facto
assessment controversies arising out of the administra-
tion of state or local taxes.

The OTC further asserted, in the alternative, that the
complaint failed to state a claim upon which relief could
be granted, pursuant to Rule 12(b)(6) of the Federal
Rules of Civil Procedure.

The OTC admits that there exists a valuation contro-
versy between the parties. However, the OTC presses its
Motion to Dismiss for lack of subject matter jurisdiction

under Rule 12(b)(1), *supra*; Plaintiff presents no cognizable dispute.

On April 21, 1983, the OTC filed its Response to the Complaint, Appendices to Response and Brief in Support of its Motion to Dismiss. The Response and Appendices provide detailed explanation of the assessment process utilized in Oklahoma for 1982, with records of the official acts of defendants, the State Officers enjoined with the duty to value and assess railroad company property for ad valorem tax purposes. That assessment process is undisputed.

The Brief in Support of OTC's Motion to Dismiss outlines the congressional history of 49 U.S.C. § 11503 demonstrating that Congress intended to provide a remedy for discrimination caused by the assessment ratio or the tax millage, and that Congress, in particular, *did not* intend to impress the status of supernumerary appraiser upon the federal district courts.

On August 25, 1983, while OTC's Motion to Dismiss was pending, the United States Court of Appeals for the Tenth Circuit upheld Judge Rogers' order in *Burlington Northern Railroad Company v. Lennen*, Case No. 82-1561 (D.C.Kan: Dec. 9, 1982), as to jurisdiction of valuation issues under § 11503, *supra*. Thereafter, BN amended its complaint herein, adding an allegation of purposeful overvaluation of BN's property with discriminatory intent.

The amended allegations did not raise new grounds or basis of claims as required by Rule 8 of the Federal Rules of Civil Procedure, but only included the conclusionary jurisdictional verbiage to bootstrap this case within the Tenth Circuit decision (*Burlington Northern Railroad Company v. Lennen*, 715 F.2d 494 (10th Cir. 1983)). At page 496 the Tenth Circuit ruled: "We emphasize, however, that a strong *prima facie* case of retaliation or intentional discrimination must be made."

The Amended Complaint and Complaint of BN yet base both jurisdiction and claimed relief upon the allegation that the "true and correct full system value of BN's property as of January 1, 1982 is \$1,495,253.00." Thus the Complaint, even though amended, raises only a pure valuation issue.

On September 14, 1983, parties briefed the impact of the *Lennen*, *supra*, decision as requested by the Court. OTC further directed the Court's attention to the recent Ninth Circuit decision in *ACF Industries, Inc. et al v. State of Arizona*, 714 F.2d 93 (9th Cir. 1983) decided August 26, 1983. ACF Industries challenged the methodology Arizona used to determine the assessment ratio, *not the valuation methodology*.

And, on November 17, 1983, the parties appeared before this Court, at which time Defendants renewed their Motion to Dismiss for lack of subject matter jurisdiction, Rule 12(b)(1). Upon Defendants' request, the Court ordered Plaintiff to lay its jurisdictional facts before the Court. Plaintiff requested the Court to defer ruling upon Defendants' Motion to Dismiss until trial on the merits. The Court set discovery schedule for the parties and ordered Plaintiff to file its statement of jurisdictional facts on or before January 31, 1984 and Defendants to file their response thereto on or before March 1, 1984. Further, in a telephone conference, the Court suggested briefs be filed as to the issue of subject matter jurisdiction and the procedure for pre-trial jurisdictional consideration and acquiesced in extensions of the time limits theretofore set.

JURISDICTIONAL ISSUE

This matter presents only a factual dispute concerning the fair market value of BN's taxable Oklahoma properties as of January 1, 1982. The jurisdictional issue is, whether a pure valuation dispute, standing alone, vests

jurisdiction in this Court under 49 U.S.C. § 11503 and 28 U.S.C. § 1341.

THE FAILURE OF PROOF

Before responding to Plaintiff's Supplementary Brief and Statement of Facts, this response will first discuss the failure of Plaintiff to establish facts in support of two crucial ultimate facts which Plaintiff asserts to convince this Court that the State of Oklahoma has purposefully overvalued its taxable property with discriminatory intent.

First, BN asserts that the valuation methodology utilized by the OTC in 1982 was substantially changed from the valuation methodology utilized in 1979, 1980 and 1981 to give the appearance of compliance with § 11503, *supra*. Second, BN asserts that the primary objective of the OTC in its valuation methodology was to maintain aggregate railroad assessments at or near the 1981 level.

In support of its first crucial ultimate fact, BN relies upon two self-serving affidavits of its employee, Thomas Wehner. Wehner's affidavits eschew and otherwise collaterally attack official actions for years prior to 1982, in an attempt to create a factual dispute as to the intent of the OTC in 1982.

In view of the whole record, these affidavits are nothing more than mere speculation as to the subjective intent of Lewis Bohr; inadmissible parole evidence attacking official documents. The 1981 value of BN was fixed by official action in 1981 and appears of record. Defendants strenuously object to BN's attack on *unchallenged*, prior official acts.

Wehner affies that the then Director of the Ad Valorem Tax Division of the Oklahoma Tax Commission, Mr. Lewis Bohr, reduced "*his net book cost indicator*" significantly by deducting from the net book cost an amount attributable to functional or economic obsolescence; and,

that Mr. Bohr, in his handwritten notes, Exhibits 5, 6 and 7 to Wehner's Affidavit filed March 1, 1984, indicated "estimate of full system values to be \$344,424,735.00, assessed at 23.5% in 1979, \$331,378,760.00 assessed at 21.75% in 1980 and \$2,107,321,000.00 assessed at 19% in 1981. Such testimony is mere opinion of another's opinion and not creditworthy.

At the crux of Mr. Wehner's affidavit is BN's approval of a valuation methodology based only upon the cost indicator, contrary to its ultimate goal in this lawsuit to force the State of Oklahoma, with the aid of this Court, to base its ad valorem tax valuation upon the net income at BN. This contradiction demonstrates the self-serving nature of the testimony and removes any possible credit from the testimony. Further, Wehner's affidavit, attempting to dignify Mr. Bohr's handwritten notes as a "valuation methodology" *does not* establish or even hint at the intent of the OTC to formulate radical change in the valuation methodology to compensate for the application of a single, uniform assessment percentage in 1982 of 10.87%. It speaks only to Mr Bohr's *indications*, not his acts as Ad Valorem Tax Division Director.

The prohibitions of § 11503 became effective in 1976, thus, according to Wehner's affidavit, BN certainly had a § 11503 lawsuit in 1979, 1980 and 1981 based upon those purported high assessment ratios. However, BN neither protested to the State Board nor litigated those numbers in any court in this State, even though under *Poulos v. State Board of Equalization*, 552 P.2d 1138 (1976) local assessments were equalized between 9% and 15%.

Wehner's affidavit is too weak to support the sweeping ultimate facts asserted by plaintiff. The official records and the testimony given at deposition of Mr. Borr, Ray Taylor, Odie A. Nance and J. L. Merrill are of greater dignity and absolutely refute Mr. Wehner's speculations.

Mr. Bohr testified that he prepared his handwritten notes, during conferences with the tax representatives of

the various companies who came in for a conference, to memorialize their suggestions and to give the tax representatives notes to take back to the company management (Bohr Deposition 41: 19-21, 50:25, 51:1-7, 67:16-22); that, as Division Director, he had no intention of using the handwritten notes as the official valuation methodology (Ibid. 52:1-2); and, that, the formula set out on the worksheets were the official valuation methodology (Ibid. 39:13-19, 49:9-21).

As to the "significant change" in the 1982 valuation methodology, Mr. Bohr testified on direct examination:

"Q. The question is: What number is that 10.87 to be applied to?

A. I think once the Oklahoma factor, which in '81 was 3.75, you have come up with an Oklahoma portion of that system value of a hundred thirty-six million. All right. When you use the same application and the same computation other than you change the weighting factor on income from twenty-five to forty, and, of course, the cost goes to the sixty percent from seventy-five, plus you change the Cap. rate from what, eleven to fourteen percent, *and you come up with an identical methodology of computation of system value*, and that in the case of 1982 is a hundred and twenty-six million. *So, we haven't increased what we consider to be your Oklahoma proportion of the value at all. We are reducing it.* We are reducing the assessment, and I can't understand what you want from the Tax Commission and from certainly, those of us in the Ad Valorem Division who have worked and tried all through the years to be helpful to you and do everything we can to you to help with your assessment and your final assessed value." (Ibid. 40: 2-21) (Emphasis added.)

Oklahoma did change its 1982 valuation methodology from that used in 1981, as it had for several years.

These change were put into place by Mr. Bohr, as explained in the affidavit of David Ray Taylor, Exhibit I, Appendices to Response of Defendant:

"b. Beginning in 1976 the formula for valuation of Oklahoma fair cash value of railroads was changed to include two factors: original cost depreciated and capitalized income. The following formulas were utilized for the year indicated:

Year	Weight Assigned to Original Cost Depreciated	Capitalization Rate	Weight Assigned to Capitalized Income
1976	90%	8.50%	10%
1977	90%	8.50%	10%
1978	80%	9.50%	20%
1979	80%	10.00%	20%
1980	75%	10.50%	25%
1981	75%	11.00%	25%
1982	60%	14.00%	40%."

As to the intent of the Commissioners in directing the uniform application of the 60/40 valuation methodology for 1982 values and the uniform application of the 1982 assessment percentage of 10.87%, the Commissioners testified:

Chairman:

"Q. Did you in any way attempt to define the permissible assessment ratio in terms of whether it would produce an increase or decrease in total railroad assessments?

"A. Well, once again, you can look at what the results turns out to be, and, of course, you have records that shows what it has been historically, *but if the intent of your question is whether we were trying to get to some desired level or preconceived level, the answer is no.* It just had to come out the way it came out. Once you get the total list of fair cash values for all the railroads and you apply the

assessment ratio, you can only come up with one answer. It's not going to change. But, that doesn't keep you from seeing how it stacks up against the previous year, you know that information. But, there is no preconceived notion of where you want to get to. The system should not be approached that way. Our duty is to find out what the fair cash value of the property is, apply an appropriate assessment ratio, then our work is done. And, when I say applied, we recommend an assessment ratio, the Board of Equalization either adopts or rejects our recommendation." (Emphasis added.)

(Odie A. Nance Deposition, 96: 2-25)

Vice-Chairman

"Q. To whom did you defer on ad valorem tax matters?

"A. I didn't defer to anyone. I listened to the conversations that took place, if it sounded fair and even-handed, I could go along with it."

(Robert L. Wadley Deposition, 30: 24-25, 31: 1-3)

Secretary-Member

"Q. Did you make any computations or see any computations which would indicate what the effect of applying a 10.87 percent ratio across the board to all railroads would be?

...

"A. Not on tax revenue. That's not our function. That's all at the local level. The millage is established there and it can vary, partly with the people's choice as to bonds they might want to vote on and so on and so forth."

(J.L. Merrill Deposition, 83: 22-25, 84: 6-11)

The minutes of the State Board, filed herein by BN, the minutes of the OTC and the official communications

of the OTC to the State Board, each indicate that the OTC and the State Board were *only* concerned that the assessments were uniform and met the requirements of 49 U.S.C. § 11503, without regard to any increase or decrease in aggregate assessments. (Exhibit A, Appendices to Response of Defendants.) In fact, the memorandum from Reece Womack, Economist, to the Commissioners, dated April 23, 1982, part of Exhibit A, clearly states that a ratio of 11.32% is necessary to maintain the 1981 aggregate assessed value of railroad property, but 10.87% was used to assure compliance with § 11503, *supra*.

There is no evidence other than Wehner's affidavits to support Plaintiff's crucial ultimate facts that the 1982 valuation methodology was substantially changed or altered to give the appearance of compliance with § 11503, while the primary objective of the Commission in its 1982 valuation methodology was to maintain aggregate railroad assessments at the 1981 level.

Therefore, Defendants propose first and foremost that this Court find that Plaintiff has failed to prove by competent and creditworthy evidence a strong *prima facie* face of purposeful overvaluation with discriminatory intent, upon which this Court's jurisdiction may be based.

STATEMENT OF FACTS

The OTC receives annual ad valorem tax reports from the various railroads having property in Oklahoma and makes findings and recommendations of valuation and assessments to the State Board (68 O.S. 1981, § 2454).

On April 25, 1982, the OTC laid its findings and recommendations for 1982 ad valorem tax assessment of BN's taxable property in Oklahoma as follows:

1982 Fair Cash Value:	\$126,194,733.00
1982 Assessment Ratio:	10.87%
1982 Recommended Assessed Value:	\$13,717,367.00

(Appendices to Response, Exhibit A)

For 1981, BN self-assessed its Oklahoma taxable property at \$14,335,355.00 without specifying the valuation methodology or assessment percentage it used. (Bohr Deposition 55: 10-20, 56: 13-17.)

BN's net properties increased significantly from 1980 to 1982 occasioned by substantial capital expansion, per testimony of BN's Financial Officer:

"My question is, understanding that these were estimates of conversion, we see an approximate increase of \$300 million from 1980 to 1981, and again approximate increase of the estimate of gain about another \$300 million from '81 to '82. Is that a fair statement?

"A. Yes.

"Q. What, to your knowledge, would have occasioned the increase in these estimates?

"A. Well, because they pertain to successive years, and during each succeeding year we would have expended a very substantial amount of money on rail replacement, tie replacement, ballast replacement and the labor that went with it, and what you're looking at is the increment from the successive years capital program.

"Q. So assuming hypothetically that the Burlington Northern Railroad had been, as a matter of fact, operating underratable depreciation all along, the two-year increase to the capital account would have been in the vicinity of \$600 million, is that a fair statement?

"A. Yes. I think so, if I understand the question. Yes." (Emphasis added.)

(Garland Deposition, 48:14-52:6)

On May 19, 1982, the State Board assessed the BN as recommended by the OTC. (Appendices to Response, Exhibit B.)

For 1982 ad valorem tax purposes in Oklahoma, the taxable rail transportation property of BN was assessed at 10.87%, which is the same, exact statewide average assessment ratio applied to local assessed commercial and industrial property as determined from the most current completed study of levels of assessment as of April 25, 1982.

For 1982 ad valorem tax purposes in Oklahoma, the taxable rail transportation property of BN was valued by a determination of the full system unit value allocated to Oklahoma by using two indicators of value; original cost depreciated weighted 60% and three years weighted income capitalized at 14% and weighted 40%. (Appendices to Response, Exhibit M.)

For 1982 ad valorem tax purposes in Oklahoma, the taxable rail transportation property of all railroads within this state was valued by the same methodology as BN's property. (Appendices to Response, Exhibit J and Exhibit I to Deposition of Odie A. Nance.)

For 1981 ad valorem tax purposes in Oklahoma, the taxable rail transportation property of BN was valued by a determination of the full system unit value allocated to Oklahoma by using the two indicators of value used in 1982, cost and income, although the weightings and rates were different. (Appendices to Response, Exhibit K and Bohr Deposition 67:7-10.)

The above proposed facts are clarified and supported by the following historical overview and direction of the State of Oklahoma in its assessment process relating to ad valorem tax valuation of rail transportation properties.

A. HISTORICAL OVERVIEW OF RAILROAD VALUATION, PARTICULARLY OF THE BN/FRISCO SYSTEM SINCE 1965.

Most, if not all states, which are required to estimate a fair market value of railroads or public service corporations, currently employ a "unit method" of valuation,

and arrive at such unit valuation through "mass appraisal" techniques. Oklahoma has used a mass appraisal technique for the 1982 assessment year in question. Expert witnesses in valuation, such as Michael Goodwin on behalf of Defendants, or Arthur Schoenwald on behalf of Plaintiff, use a more detailed appraisal methodology commonly known as "fee appraisal".

The exact methodology Oklahoma used was a combination of the cost approach and the capitalized income approach, with a five-year weighted income analysis. In correlating these independent "value indicators" for 1982, Oklahoma gave a 60% weight to cost and a 40% weight to capitalized income. In arriving at the capitalized income stream, Oklahoma employed a so-called "capitalization rate" of 0.14 or 14%. There are no material disputes as to any evidentiary fact for the 1982 methodology. See Affidavit of David Ray Taylor, Exhibit "I" to Defendants' Response (Answer).

In its Statement of Facts, Plaintiffs track with more or less accuracy the fact that Oklahoma has over the years changed or evolved its evaluation methodology in order to arrive at the approach used in 1982, described above.

With particular respect to Burlington Northern Railroad Company and its predecessor-in-interest, St. Louis and San Francisco Railway Co. (Frisco), whom Burlington acquired circa 1979 (BN did not operate in Oklahoma prior to its acquisition of the Frisco system), Plaintiffs gloss over certain material *and undisputed* facts relative to the valuation history. Plaintiff casually admits at several points in its brief that BN's 1982 value was a "slight reduction" in its valuation for 1981.

Defendants submit that the following facts show that this phraseology, "*slightly lower*", is, at best, an euphemism. The Court's attention is respectfully directed to the affidavit of Gene Tyner, Sr., filed herein on April 28,

1983. Firstly, Mr. Tyner, a practicing economist who analyzed the historical assessments of BN/Frisco over a thirty-two year history, but in constant dollars, opined a "very significant historical reduction in assessed value" of Plaintiff since 1965. Next Mr. Tyner stated that 1982 represented a reduction from 1981 (again expressed in constant dollars) of approximately 16½%. This reduction (about 5/6 of BN's 1981 value) is what BN characterizes as only a "slight" reduction, and still one they argue, which is demonstrative of purposeful overvaluation.

The Court's attention is also respectfully directed to Exhibit "E" to Mr. Tyner's constant-dollar comparisons. The figures in the third column, "Value Returned by Railroad", are the very figures returned by BN/Frisco as its returned value or "self-assessment". The Court will note Frisco's 1950 returned value was \$15,925,965; i.e., self-assessed 32 years prior to the 1982 assessment year. Mr. Tyner selected 1965 as a bench-mark year, since that was the year Congress made an initial finding of railroad discrimination. See, Table at Page 11 of Oklahoma Tax Commission's initial Brief in Support of Motion to Dismiss, which Table was extracted from Senate Report (on Section 306) No. 1483. As stated, Oklahoma's assessment in 1965 was found by Congress to be 49% excessive (based not on valuation but upon an *excessive assessment ratio*). With that in mind, Exhibit "E", the last column, shows that by 1975, the Frisco was returning values that had cut their value in "real" or constant dollars by 51% of the 1965 self-assessed value. By 1981, BN (Frisco's successor) had returned a self-assessed value (\$14,333,355) which was 29.25% or less than ⅓ of its 1965 self-assessed value in real dollars. In 1982, the assessment year in question, BN claims an assessed value of \$5,737,450, or 10.71% (1/10) of its own self-assessed value in 1965.

For additional comparison of Plaintiff's historical treatment, the Court's attention is further directed to

Exhibit "F" to Mr. Tyner's Affidavit. There, Mr. Tyner undertakes essentially the same comparison in real or constant dollars, except he compares Oklahoma's final assessed value of the subject system in Oklahoma, rather than the railroad's returned (self-assessed) value. The year 1965 was used as a benchmark year, for the reason earlier stated. The fifth column, entitled "1965 assessment amount inflated", shows Oklahoma's 1965 assessed value, brought up to 1982 only upon the effects of inflation. By comparison in real dollars, the Oklahoma assessed value at issue, \$13,717,367, is *only 12.5% (exactly 1/8) of the value* Oklahoma assessed the subject railroad in 1965. It is important for the Court to note that this historical overview is based upon actual and official assessment figures maintained by the Oklahoma Tax Commission, Exhibit "A" to Tyner's Affidavit. To claim that Oklahoma has, especially since 1965, practiced "purposeful overvaluation" of this line, when its assessment is 1/8 of the 1965 assessment, and especially when its assessment for 1982 is *less than* the railroad's own returned (self-assessed) value for 1981, is absurd. The whole argument is *reductio ad absurdum*. It certainly does not represent a strong showing, from an historical perspective, of purposeful overvaluation.

There is, further, undisputed evidence, specifically learned after Mr. Tyner's affidavit, that illustrates that Oklahoma's value reductions, particularly those made in 1981 and 1982, were done contemporaneously with an enormous capital expansion by BN of its entire rail system.

On February 9, 1984, Defendants took the deposition of Mr. Robert F. Garland, Senior Vice-President for Finance and Planning of Plaintiff railroad. The annual stockholders' reports (Annual Reports) of BN, pursuant to ICC mandate, have for a number of years required track accounts to be stated, also, in terms of ratable depreciation. These restatements are in addition to the

balance sheet figures, which are stated in terms of Retirement Replacement, Betterment (RRB) Accounting. The 1982 Report (Exhibit "3" to Garland deposition) at page 39, shows the following caveat, which was highlighted at time of deposition:

"Assuming we had ratably depreciated our track structure, it is estimated that *net* properties would have *increased* \$1,696,468,000 . . .". (Emphasis added.)

The same restated (ratable depreciation) net property figure for track, according to the 1980 BN Annual Report (Exhibit "A" to this Brief) was:

"Assuming we had ratably depreciated our track structure, it is calculated *net* properties would have *increased* \$1,125,439,000 . . .". (Emphasis added.)

This is a net increase over a two-year (end of year to end of second year) period in track accounts of \$571,021,000. In the view of Defendants, this net increase could not have been caused by an accounting conversion or restatement, since the figures compared ratable depreciation 1980 to ratable depreciation in 1982. The net increase *must* have been occasioned by capital expansion as confirmed by Mr. Garland.

Assuming that Mr. Schoenwald's "value" of \$1,495,253,000 is accurate, the relatively current cost capital investment of \$571,021,000 during 1980 and 1981 would have been an increase over or addition to system value of roughly 38.19% of total system value. If one takes the 1982 Oklahoma system value of \$3,574,921,544 as accurate, the two year capital increase (investment) of \$571,021,000 is still an increase of roughly 15.97% over system value. Whether this significant capital increase was 15.97% or even 10%, it was still, in Mr. Garland's opinion, an expenditure for capital improvement of "a very substantial amount of money". The important thing for this

Court to note is the juxtaposition of these events; that is, Oklahoma was *reducing* value at the same time BN was significantly *increasing* its capital investment. Oklahoma reduced value in 1982 by 16½% from 1981's value at a time when BN increased value between 8-19% (½ the two-year expansion of between 15.9-38.19% of value). This hardly demonstrates a purposeful overvaluation.

Lastly, as stated by Chairman Nance in his deposition, Oklahoma's assessment ratio for 1982 was 10.87% of market value. This ratio was that determined by ratios applicable to local commercial and industrial properties *only*. Had Oklahoma desired, this ratio, and hence final assessed value, could have been *significantly increased* by weighting into the 10.87 figure the centrally assessed commercial properties, which were assessed at 26% for the 1982 year. This "weighting in" of centrally assessed properties has been uniformly approved by the federal courts under Section 306. See *Ogilvie v. State Board of Equalization of North Dakota*, 657 F.2d 204, 208-209 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981). Therefore, a United States Circuit of Appeals had affirmed including centrally assessed properties, and the United States Supreme Court had denied certiorari, the year *preceding* the year in question. The Tax Commissioners were aware of their right to bolster the assessment ratio under *Ogilvie*, but declined to do so, opting for a conservative approach to valuation, in order to ensure they did not violate the 4-R Act. Nance Deposition, pages 94-96; Merrill Deposition, pages 64 (line 25) -66, where Commissioner Merrill stated in response to Plaintiff's question concerning central tendency (assessment ratio) for the 1982 year in question:

"A. Now, I believe your question was why had the Commission not previously assessed railroads at a common percentage, that percentage being the one which we believed to be the generally prevailing

central tendency at the local level among industrial and commercial properties all over the state. Prior to 1982, as I said, we did not look at these things, these ratios.

"Now, from my own past experience and my own knowledge of the perpetual, virtually perpetual, decline in the values of railroads, I was satisfied in my own mind that *we probably were in compliance with the 4-R Act* at the time of its enactment if not before; and, of course, the act in its very nature gave the states who might not be in compliance three years to clean up their act, so to speak. It did not become effective until February 5th, 1979 after then President Ford signed it into law in February 5th, 1976; and I for one was satisfied that as to the class we probably were in compliance.

"If, in fact, we might not have slipped a little bit below the maximum level which we could have imposed had we chosen to, *especially taking into account that a suspicion I had has later confirmed in I believe the Ogilvie case in Kansas*, at least, by a federal district judge that *it might just be proper to add in the other state assessed utilities and public service companies which are commercial, either commercial or industrial*, by their nature to these commercial and industrial properties which we found and analyzed at the local level. *We chose not to do that.*

"Again, I think that was an *indication of leniency, of giving the benefit of the doubt that might exist as to the valuation, and we chose not to raise that ratio any higher than the level which the ad valorem division director at that time, Mr. Bohr, told us from his ratio study efforts did appear to exist on the average at the local level among the 77 counties of Oklahoma.*

"Q. Let me ask you—

"A. And, so, 10.87 we presented, we accepted that and applied it once the appraisals had been made." (Emphasis added.)

Such a conservative approach to the lowest possible assessment ratio, even though federal law would have allowed higher ratio, and hence higher assessed valuation, can hardly justify Plaintiff's perceived "overview" of intentional and systematic overvaluation, in order to justify revenues or "maintain values". Plaintiff's brief at page 22.

With respect to the argument that Oklahoma sought to "maintain" railroad values, (Plaintiff's Supplemental Brief pages 21-22, footnote 10), Defendants would again refer the Court's attention to the undisputed evidentiary record of this case. *Every* class but railroads and airlines, since 1965, has increased. Railroads have enjoyed a steady decrease. This decrease in real dollars is again, greater than appears, because the effects of inflation would be to increase valuation. Affidavit of Gene Tyner, Sr. Even BN admits a decrease in railroad class from 1981 to 1982. Plaintiff's Supplemental Brief, footnote 10, which shows railroads as a class decreased in 1982 by \$1,686,904. It is interesting to note that BN's own decrease in assessed value was from \$15,014,650 (1981) to \$13,717,367 (1982) or a net decrease of \$1,297,283; i.e., BN received a lion's share (over $\frac{2}{3}$) of the net decrease afforded railroads as a class. Assuming arguendo BN's argument that the OTC's "primary objective" was "maintaining aggregate railroad assessments at or near 1981 levels", Defendants respond that, given BN's healthy reduction (16½% for 1982), we must have stuck some railroad other than BN to "maintain its aggregate railroad levels".

In summary, the historical "overview" of railroads, especially of the BN/Frisco, decries BN's claim of purposeful, historical *overvaluation*.

B. DIRECTION OF THE ASSESSMENT PROCESS IN OKLAHOMA.

As stated earlier herein, BN initially framed this cause as a valuation dispute resulting in a de facto assessment ratio stemming from its perceived "true market value". When the United States Court of Appeals for the Tenth Circuit in its *Lennen* decision *specifically rejected* such an approach as not falling within the actionable causes under Section 306, Plaintiff hastily amended to allege "purposeful overvaluation with discriminatory intent". By interrogatory, Defendants inquired exactly how and in what manner they "purposefully overvalued" Plaintiff's property for 1982. Interrogatory No. 1. The Plaintiff's answer is instructive:

"Answer: In making their assessments of Plaintiff's rail transportation property for the 1982 tax year, the Defendants were unconcerned with ascertaining the true market value of rail transportation property, *were oblivious to the correct method of determining the true market value of rail transportation property*, and were merely "result oriented", i.e., the Commission changed valuation methodologies and manipulated valuations to derive whatever "assessments" they deemed necessary for state purposes." (Emphasis added.)

The direction, "result oriented", of Oklahoma's assessment process is not BN's complaint. BN wants to order for the State of Oklahoma the correct valuation methodology. The "correct method" is, obviously, that touted by Arthur Schoenwald, the journeyman expert for this Plaintiff, who literally travels the country testifying in proceedings for this and other railroads. The direction of Oklahoma's valuation methodology is fully explained in Mr. Taylor's Affidavit (Appendices to Response, Exhibit I). This is the *direction*, i.e., greater weight to income coupled with increased capitalization rate(s) for

capitalized income, has historically been advocated by the railroads themselves. See Affidavit of Arthur Schoenwald. There is no serious dispute that the resulting effect of such an alteration, or *manipulation*, in methodology, at least with respect to the railroad industry, has the inevitable result of *decreasing* fair market value. This in fact occurred in 1982, as has been demonstrated heretofore. Accordingly, the untrue portion of BN's answer, mentioned above, is that methodology was changed in order to derive whatever assessments were "deemed necessary for state purposes". Query: if one intended to overvalue, why would one change valuation methods that had the inexorable result of *lowering* value? The answer is that instant Plaintiff disputes not the direction of the change in methodology, but only the *degree* in which that change occurred. Plaintiff advocates an even greater weight to capitalized income, and an even greater capitalization rate. Affidavit and Report of Arthur Schoenwald. The Court should again note, however, that Oklahoma's 1982 fair market value of BN's Oklahoma Property: \$126,194,733 (which resulted from the changed methods, assessed at a ratio of 10.87%, yields an assessed value of \$13,717,367, which is *less than* BN's own returned value (self-assessment) for the prior (1981) year, to-wit: \$14,335,355. Obviously, Oklahoma moved in a direction to better meet BN's expectations of value (whether these expectations are in fact justified or not). This lawsuit was occasioned by virtue of the fact that the Plaintiff thinks Oklahoma did not move *far enough* in that direction. This is hardly the case for either purposeful overvaluation or intentional discrimination.

The Plaintiff was next asked by Interrogatory the facts relied upon to justify the alleged purposeful overvaluation. With particular respect to what was allegedly done during the year in question: 1982, the Plaintiff addressed those facts in paragraphs f-h of its second answer to Interrogatories:

"f. Mr. Bohr *resigned* in January, 1983. Although he did not formally recommend an assessment of BN's property for the 1982 tax year, he participated in the computation of a recommended assessment. Bohr Deposition, p. 25; Deposition of Robert Hartman. In making its assessments of rail transportation property for the 1982 tax year, the Commission applied for the first time the same assessment ratio to all railroads, *the Commission substantially increased its estimates of railroad values*; the Commission denied BN any economic or functional obsolescence, and *fixing a value which far exceeded the value that had (according to Mr. Bohr's statements to BN's representative) formed the basis for BN's 1981 assessment*. Bohr Deposition, p. 71; Compare Bohr Deposition, Exhibit 8 with Exhibit 11. As alleged in BN's complaint, the Commission's 1982 value is grossly in excess of true market value. Affidavit of Mr. Arthur A. Schoenwald.

"g. For the 1982 tax year, Deloitte, Haskins & Sells performed a qualitative analysis of the Commission's valuation methodologies and procedures and recommended significant changes in those methodologies and procedures. The methodologies and procedures recommended by Deloitte, Haskins & Sells are, in all essential respects, identical to the valuation methodologies employed by BN's valuation expert. Deposition of William Peak. Such methodologies would, if implemented, undoubtedly result in a substantially lower estimate of the true market of BN's property than that fixed by the Commission. Dr. Arthur A. Schoenwald.

"h. [REDACTED] Deloitte, Haskins & Sells was contractually obligated to advise the Commission on the degree to which the Commission valuation methodologies complied with industry standards. BN anticipates that the further deposition of Mr. Peak will show that the

Commission was advised that its methods did not meet industry standards." (Emphasis added.)

Chronologically with respect to the above-quoted "facts" Mr. Bohr did not "resign" on January 1, 1983; he retired as a vested state employee. Bohr Deposition, page 6, line 10. It is true that in 1982, and beyond, the Commission mandated that the same or uniform assessment ratio be applied to railroad values.

The next issue is one, purportedly factual, which underlies much of Plaintiff's attempt to imply overvaluation and attain federal jurisdiction. The Plaintiff states that (for 1982) "the Commission *substantially increased* its estimates of railroad values". (Emphasis added.) According to BN, the State Board established a system fair cash value for BN for 1981 of \$2,107,321,200. That is categorically untrue. (See Response, paragraph 25, filed herein.)

This Court's attention is respectfully directed to the Affidavit of J. L. Merrill (Exhibit J to Defendant's Response) and specifically to the attachment thereto entitled "Railroads". It is important to note that the attachments *are* official records of the OTC. Further, they were prepared in *advance* of the determination of the 1982 assessment in question, so that the OTC could equalize the disparate assessment ratios it found had existed during 1981. See Affidavit of J. L. Merrill, page 41, line 22 through page 49, line 3. In his deposition, specifically, at page 48, line 1, Commissioner Merrill states:

"A. Well, since this (referring to Exhibit J, document which at the time it was prepared or at least what it *purports to show was history already set in concrete*. This is a *representation of what had been done and had been approved by the Commission in 1981 which had subsequently been approved by the State Board of Equalization*. And, without going

behind the face of what I see here, *all I know is that these were the assessed values approved*." (Emphasis added.)

Exhibit J, attachment entitled "Railroads" prepared before this litigation, indeed prepared before BN's 1982 assessment had even been determined, reflects the official recommendations of the OTC in 1981, and reflects, according to Mr. Merrill's testimony, the official act of the State Board in approving this recommendation. This official pre-litigation document plainly provides with respect to BN's assessment for 1981 in pertinent part:

"Name:	Burlington-Northern Inc.
Current (1981) Assessment:	\$ 15,014,650
Cash Value 1981:	\$136,621,019
Current (1981) Ratio:	<u>10.99."</u>
(Emphasis added.)	

This official document shows that the 1981 official ratio was 10.99% of Oklahoma fair cash value. It further shows that BN's Oklahoma fair cash value for 1981 was officially determined as \$136,621,019.00.

The Plaintiff seeks to create a factual controversy through the Affidavits of Thomas Wehner, who "really knows" what the State Board did and testifies or opines that the real assessment ratio for 1981 was 19%. Mr. Wehner is incompetent to give this testimony. However, the Court can notice that, assuming the competence and truth of Wehner's testimony, a clear violation of the 4-R Act *would have occurred, but in 1981*, when the assessment ratio of 19% clearly exceeded the permissible variance under the 4-R Act.

JURISDICTIONAL REQUIREMENTS UNDER LENNEN

In *Burlington Northern Railroad Company et al. v. Lennen, et al.*, supra, decided by the United States Court of Appeals for the Tenth Circuit on August 25, 1983,

writ of certiorari to the United States Supreme Court pending, the lower court's refusal to hear the valuation issue was affirmed.

Most of the railroads involved in *Lennen*, supra, had substantial increases in their property valuations between 1981 and 1982. The procedures used by the state were found to have been used for a long period prior to the 1982 valuations by Kansas. Judgment of the state tax administrator accounted for the increase.

The Tenth Circuit held "that a suit can be maintained whenever a railroad can make a strong showing of purposeful overvaluation of a particular railroad's property with discriminatory intent . . .". (Page 496.)

Plaintiff directs attention to the fact that *Lennen*, supra, went to the Tenth Circuit on a denial of a preliminary injunction, not a Motion to Dismiss. And, Plaintiff asserts that no other valuation case has been dismissed for want of subject matter jurisdiction, citing *Missouri Pacific R.R. v. Mauer*, No. CI 82-C-1445 (1982, D.C. Colo.). Both the *Lennen* and *Mauer* cases, supra, involve issues other than valuation, while this case is a pure valuation, single issue case.

Judge Rogers' decision in *Lennen*, Case No. 82-1561 (D.C. Kans. Dec. 9, 1982) recited in detail the congressional history of § 11503, supra, and in particular the admonition from the United States Justice Department that constitutional issues would be raised if federal courts were required to perform valuation of properties. Congress was advised that the courts can and should construe this legislation to avoid any charge that a non-judicial function (valuation) is required to be performed.

Indeed, Congress had no misconception about the term "value" and the necessity, legal and practical, to keep the federal district courts out of the quagmire of valuation. The Senate Committee on Commerce, Appendix B to Report 1483 (see pages 12-14, Brief in Support of Motion

to Dismiss) succinctly stated that Congress did not have before it a standard for the states to determine "value" (fair market value/fair cash value/full market value/true market value); rather, it had a bill that sets a standard for rail transportation property to be assessed at the same percentage of the given value as other commercial and industrial property in the State.

Appendix B found that the term "value" had already been judicially defined, citing three of numerous cases, to-wit: *New York Bay R. Co. v. Kelly*, 22 N.J. Misc. 204, 37 A.2d 624, 628 (1944); *Fort Worth & D.N. Ry. Co. v. Sugg* (Tex. Civ. App.) 68 S.W.2d 570, 472 (1934); and, *Guyandotte Valley R. Co. v. Buskirk*, 57 W.Va. 417, 5 S.E. 521, 526 (1905).

At pages 628-629, in the *New York Bay R. Co.* case, supra, an ad valorem tax valuation case, the New Jersey Court stated and concluded:

"(1,2) The 'true value' at which property is required to be assessed by an assessor is that price which would be paid for the property on the assessing date in a sale between a willing seller, not compelled to sell, and a willing purchaser not compelled to purchase, by private contract at a fair and bona fide sale. While properties such as the developed road waterfront terminals under appeal are never actually sold or purchased, the duty is nevertheless cast upon the assessor to conceive of a hypothetical sale and to assess the property for taxation at a price which requires a consideration of all of the uses to which the properties under appeal are adapted and for which they might be purchased, either as entireties, or in selected portions. We cannot imagine a use to which any of these terminals would be better adapted as entireties, than the uses to which they are now put, i.e., as railroad waterfront terminals. Limited parts of the waterfront

might have a greater utility for steamship purposes, if considered separately.

"We conclude that the determination of the extent of decline is a matter which calls for the exercise of sound and experienced judgment on the part of the valuator. Equally well informed and competent experts may honestly have the widest range of difference of opinion on this subject. The expert testimony in this case is radically conflicting. We cannot say that the judgment in this matter of the statutory assessor, the State Tax Commissioner, as reflected by the gross reductions of 19% in this valuations in 1936 and 1939 is erroneous. This seems almost inevitable because of the emphasis which has been placed by the courts upon the statutory right of the assessor of railroad property to use his 'personal knowledge and judgment' in the valuation of such property.

In *Central R. Co. v. State Board of Assessors*, 49 N.J.L. 1, at page 9, 7 A. 306, 310, the court stated:

"We do not consider that we have the right to alter or annul any of the proceedings of this body of officers except for palpable error; for it is not to be overlooked that the statute in question expressly declares that these assessors 'shall be entitled to use their personal knowledge and judgment as to the value of the property',—a capacity with which this court is not endowed by the legislature." (Emphasis added.)

At page 525, in the *Guyandotte Valley Ry. Co.* case, *supra*, a condemnation for railroad purposes case, the high court of West Virginia stated:

"But the defendants seem to think the term 'market value' has some peculiar meaning or significance which precludes the introduction of certain kinds of evidence and directs inquiry by the jury to some

value other than that which, upon consideration of all the evidence bearing upon the question of value, they think is the actual value of the property. This necessitates an inquiry into the meaning and purpose of the market value rule.

* * * *

*"The use to which the owner has applied his property is of no importance, beyond its influence upon the present value. If highly cultivated, it will be worth more than if suffered to run to waste. * * * What price will it bring in the market? That is the proper inquiry in a proceeding of this kind. As between individuals the owner may demand any price, however exorbitant, for his property; but when it is taken for public purposes he can only demand its real value. That value cannot depend in any degree on his own will. To allow either his judgment or his fancy in relation to the proper use of the property to influence the question would be to make the estate either more or less valuable, as it might happen to be possessed by one individual or another." Another value which it would be obviously unjust to adopt is the value to the appropriator for the purpose for which it is taken, another special utility value, instead of the value for all purposes to which the property is adapted. If this were permitted, a city, town, county court, school board, or railroad company might be made to pay many times the actual value of a piece of property indispensable to its purposes. Another kind of value guarded against by this rule is the speculative value. *Muller v. Railway Co.*, 83 Cal. 240, 23 Pac. 265." (Emphasis added.)*

Relying upon these cases to define "value", the Congressional Committee Report guards against invasion of the federal courts upon the states' authority to determine the valuation process or valuation methodology and recognizes the hypothetical nature of the task of the local

tax administrators and the inherent need for exercise of judgment by those local tax administrators.

However, BN urges this Court to endow itself as a tax administrator, thereby providing BN with the opportunity to convince the Court that BN's valuation expert is right.

The Tenth Circuit refused to give BN the opportunity to seek relief from a pure valuation dispute, relegating BN to its remedy provided by state law for grievances alleged by defacto assessment percentage discrimination or overvaluation.

Defendants propose that this Court find that Plaintiff may not maintain this pure valuation suit as Plaintiff has failed to make a showing of a strong prima facie case of purposeful overvaluation with intentional discrimination.

PRE-TRIAL PROCEDURE UNDER RULE 12(b) (1)

Plaintiff poses that Defendants' Motion to Dismiss be treated as a Motion for Summary Judgment under Rule 56; that the standard for a ruling on Defendants' Motion is whether Plaintiff has raised a genuine issue of material fact.

Defendants will say one more time, there exists a genuine valuation dispute between the parties.

Defendants' Motion to Dismiss goes to Plaintiff's lack of showing to this Court that the dispute is reached by the special remedy in § 11503, *supra*.

Plaintiff relies upon *Baker v. Hunn Roofing, Inc.*, 399 F.Supp. 628 (W.D. Okl. 1975) for its argument that Defendants' Motion should be governed by Rule 56.

Baker v. Hunn Roofing, Inc., *supra*, was a personal injury action brought by the parents of a 13 year old who was seriously injured in the course of his employ-

ment, carrying hot tar, when he spilled a bucket of hot tar over his entire body. Defendant filed a Rule 12(b) (1) Motion to Dismiss alleging that the exclusive remedy was under the Worker's Compensation Act. Plaintiff responded that violation of the child labor laws prevented the remedy under the Worker's Compensation Act. The Court held that whether Plaintiff's employment was especially hazardous, and thus in violation of the child labor laws, was a question of fact for the jury and denied the Motion to Dismiss for lack of subject matter jurisdiction.

This case does not support Plaintiff's assertion that Defendants' Motion to Dismiss should be governed by Rule 56, nor does it stand for the proposition that this Court should defer ruling on Defendants' Motion until trial on the merits.

Plaintiff also relies on *Schramm v. Oakes*, 352 F.2d 143 (10th Cir. 1965) to support its argument that Plaintiff's Complaint should not be summarily dismissed without the ordinary incidents of a trial.

In *Schramm*, *supra*, the Tenth Circuit, for the third time on appeal, had before it a complicated automobile collision case, with laws of several jurisdictions involved. In discussing Rule 12(d), the Court stated at page 149:

"... Rule 12(d) of the Federal Rules of Civil Procedure clearly contemplates a preliminary hearing and determination of jurisdictional issues in advance of trial unless the court defers such action until the time of trial. Furthermore, as there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the Court. *Gibbs v. Buck*, 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111. Certainly the trial court may gather evidence on the question of jurisdiction by affidavits or otherwise in an effort to determine the facts as they exist, *Wetmore v. Rymer*, 169 U.S. 115, 18 S.Ct. 293, 42 L.Ed. 682 and *KVOS, Inc. v. Associated Press*, 299

U.S. 269, 57 S.Ct. 197, 81 L.Ed. 183, and based upon the evidence so obtained, decide the jurisdictional dispute before trial."

The Court found, on page 149, that "... we are unable to say with a degree of legal certainty that the appellants could not make out a valid cause of action against one or more of the appellees. The evidence is as yet inconclusive as to who was the owner of the automobile at the time of the collision."

The evidence in the instant suit is certainly inconclusive as to purposeful overvaluation with discriminatory intent. In fact the overwhelming impact of the evidence in this suit is the clear absence of any intentional overvaluation and the clear absence of any intentional discrimination. And, the evidence cogently shows intentional uniformity in the 1982 assessment procedure and intentional regard for the mandates of § 11503, *supra*.

Plaintiff does not cease its attempt to convince this Court that it should proceed to trial with its Rule 56 argument. Plaintiff further poses that this Court should equate "purposeful" with "systematic". Certainly the Defendants' acts are systematic, although not with the color plaintiff paints.

Plaintiff, at page 8 of its Supplementary Brief quotes *Southland Mall, Inc. v. Garner*, 455 F.2d 887 (6th Cir. 1972), to urge this Court to make inferences of discrimination. Plaintiff quotes one sentence, out of context, to-wit:

" 'Assuming, as we must, that public officials rarely admit wrong doing we must accept circumstantial evidence of improper intention.' "

The entire paragraph, explaining the failure of taxpayer to show discrimination, reads as follows:

"While we do not read *Cumberland Coal* to hold that failure to consider relevant factors establishes

discriminatory intent *per se* neither does our view preclude reliance on such omission as some evidence of discrimination. Assuming, as we must, that public officials rarely admit wrong doing, we must accept circumstantial evidence of improper intention. If, for instance, Appellant had been able to demonstrate that the omitted factors had time and again been held relevant in *comparable* situations by these same officials or that appraisal practice was so clearly settled that no reasonably intelligent man could believe correct the omission of a particular factor which had properly been called to his attention, then we might take the serious step of inferring intentional discrimination. See *Coulter v. Louisville & N. R.R. Co.*, *supra*. The District Court held and we agree that Appellant has not presented any proof which even approaches the required level."

At page 889, the Southland Mall Court stated:

"Relief cannot be predicated upon mere errors of judgment committed by tax officials, . . ."

"The federal courts have rigorously enforced the rule that discriminatory intention must be shown least routine complaints about the accuracy of an assessment, more properly heard in a state court familiar with local practice, clog the federal docket, disturbing federal-state relations and rendering the federal courts 'board(s) of tax review'. *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362, 367, 60 S.Ct. 968, 84 L.Ed. 1254 (1940). In explaining the intention which must be shown, the Supreme Court has stated: 'There must be something that amounts to an intention, or the equivalent of *fraudulent* purpose, to disregard the fundamental principle of *uniformity*.' *Rowley v. Chicago & Northwest Railway*, 293 U.S. 102, 111,

55 S.Ct. 55, 59, 79 L.Ed. 222, (1934).” (Emphasis added.)

Plaintiff *does not* attack Defendants’ intention to assure the fundamental principle of uniformity, which was the deliberate and expressed intent of the OTC in making its findings and recommendations to the State Board in 1982.

Plaintiff argues that the United States Supreme Court, in *Great Northern Ry. Co. v. Weeks*, 297 U.S. 135, 56, S.Ct. 426 (1936), inferred purposeful discrimination by the tax officials who disregarded the economic conditions of the U.S. from and immediately after the 1929 crash, to support its position that this Court should infer discrimination. However, the Supreme Court found the assessment to be arbitrary for failure to consider changed economic conditions, refusing to consider discrimination, at p. 152:

“We need not consider whether the assessment is repugnant to the equal protection or commerce clause. Unquestionably, the assessment was made in plain violation of established principles that govern property valuation.”

Plaintiff’s “most significant” case upon which it relies to persuade this Court to infer intentional discrimination is *Louisville & Nashville R.R. v. Public Service Commission*, 249 F.Supp. 894, 902 (M.D. Tenn. 1966). In *Louisville & Nashville R.R. v. Public Service Commission*, supra, the lower court in Tennessee had the same facts before it that had been presented to the U.S. Supreme Court in *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254 (1940). The Tennessee district court had before it the assessment practice of more than sixty years in Tennessee: different, higher assessment percentages for railroad and utility properties. The Tennessee district court, ruled, as a matter of law, that the assessment practice violated Tennessee law.

In response, Defendants propose this Court hold plaintiff to the various evidentiary rules it propounds. The record is void as a scintilla of evidence of unequal treatment as among the railroads as to valuation or assessment ratio. Indeed, Plaintiff has not even alleged historical Fourteenth Amendment or Interstate Commerce Clause violations. Its only disputed allegations are those of overvaluation, and unlike the disregard for the economic conditions known as the Great Depression, Plaintiff estimated its *increase* to net properties in 1982 to be \$1,696,468,000.00. (1982 Report, Exhibit 3 to Garland Deposition.)

Defendants further propose that this Court proceed to consider the Rule 12(b)(1) Motion to Dismiss as contemplated in Rule 12(d) and thereupon dismiss Plaintiff’s pure valuation Complaint for lack of subject matter jurisdiction under the Tenth Circuit decision in *Lennen*, supra.

CONCLUSION

Plaintiff alleges a pure valuation controversy. Defendants do not deny the existence of the valuation dispute.

Plaintiff has the burden of establishing a strong prima facie case of purposeful overvaluation with discriminatory intent to maintain this lawsuit over Defendants’ Motion to Dismiss.

Plaintiff offers this Court parole evidence which does no more than attack the credibility of official records and testimony of state officers and employees, which under state and federal law as presumed to be correct. 68 O.S.1981, § 2468 and 49 U.S.C. § 11503.

Plaintiff has wholly failed to make a strong showing of purposeful overvaluation with discriminatory intent. Neither Mr. Wehner’s opinions of Mr. Bohr’s opinions, nor BN’s expert’s, Mr. Schoenwald, opinions of valuation methodology demonstrate purposeful overvaluation with discriminatory intent.

In 1982 the OTC and the State Board intended to uniformly apply the assessment percentage to the valuations of the taxable rail transportation property within Oklahoma. That intention was accomplished.

WHEREFORE, Defendants respectfully request this Honorable Court to proceed to consider their Rule 12 (b) (1) Motion to Dismiss instant, and thereupon, to dismiss the purported Complaint herein, with costs to Defendants.

Respectfully submitted,

OKLAHOMA TAX COMMISSION
STATE BOARD OF EQUALIZATION
Defendants

By: /s/ J. Lawrence Blankenship
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General Counsel

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[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

vs.

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T. WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,

Defendants.

No. CIV-83-2165-R

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; ST. LOUIS SOUTHWESTERN RAILROAD COMPANY,

Plaintiffs,

vs.

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T. WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF

THE OKLAHOMA TAX COMMISSION; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,

Defendants.

[Filed April 29, 1985]

ORDER

On January 8, 1985 the Court granted the Defendants' Motions to dismiss for lack of subject matter jurisdiction in the above styled cases. The Plaintiff timely filed a Motion For New Trial. Or in the Alternative, For Vacation, Amendment, Or Alteration of Judgment pursuant to Fed. R. Civ. P. 59, to which the Defendants responded in opposition. The motion has been fully briefed, and the Court is now prepared to dispose of it, and an unrelated Motion for Consolidation, in this Order.

It must first be noted that the Plaintiff's motion is cognizable only as a Motion to Alter or Amend Judgment under Fed. R. Civ. P. 59(e). See *Cook v. Atlantic Richfield Co.*, No. CIV-83-1717-R (W.D. Okla. March 20, 1985). A Motion for New Trial pursuant to Fed. R. Civ. P. 59(a) is appropriate only where trial on the merits has been conducted, see *Jones v. Nelson*, 484 F.2d 1165, 1167 (10th Cir. 1973), and no such trial has been conducted in either of these cases. However, it is clear that the Plaintiff's Fed. R. Civ. P. 59 (e) motion properly challenges the Court's January 8 order of dismissal. *Cook*, slip op. at 1. See also *St. Paul Fire & Marine Insurance*

Co. v. Continental Casualty Co., 684 F.2d 691, 693 (10th Cir. 1982).

The Plaintiff first argues that the order of dismissal should be vacated in the 1982 tax case, No. CIV-83-419-R, for two reasons: (1) The Court erred in determining the jurisdictional issue without hearing live testimony; and, (2) the Plaintiff has discovered new evidence of discriminatory intent regarding the 1982 tax year. The second proposition is now moot, as the Court has refused to allow discovery from the witnesses that the Plaintiff sought to depose for its newly discovered evidence. *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, No. CIV-83-419-R, slip op. at 2-3 (W.D. Okla. Jan. 23, 1985). And the first proposition is without merit. The Court considered the facts bearing upon jurisdiction in the light most favorable to the Plaintiff, and live testimony would have lent nothing to the Plaintiff's abortive attempt to establish a *prima facie* case of intentional discrimination. The Plaintiff again seeks to have the Court hear the merits of the action before deciding the jurisdictional question, a procedure rejected as violative of the restrictive jurisdictional rule announced in *Burlington Northern Railroad Co. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), cert. denied 104 S. Ct., 2690 (1984). See *Burlington Northern v. Oklahoma Tax Commission*, No. CIV-83-419-R, slip op. at 7-9 (W.D. Okla. Jan. 8, 1985). The Court therefore concludes that the Plaintiff's motion is denied insofar as it seeks a vacation of the order of dismissal in the 1982 tax case.

However, the Court is persuaded that the motion must be granted insofar as it challenges dismissal in the 1983 tax case, No. CIV-83-2165-R. The Court, noting that the Plaintiff had failed to supplement the record in connection with its opposition to dismissal in the 1983 case, concluded that the Plaintiff intended to support its jurisdictional allegations in both cases with the same evidence.

See Burlington Northern Railroad Co. v. Oklahoma Tax Commission, No. CIV-83-2165-R, *slip op.* at 15 (W.D. Okla. Jan. 8, 1985). However, the Plaintiff now contends, and the Defendants do not seriously dispute, that the parties had agreed to litigate the jurisdictional question in the 1983 tax case only after the Court had ruled on the similar question in the 1982 tax case. The record reflects at least a tacit agreement between the parties, and the Court concludes that the lack of an evidentiary record in No. CIV-83-2165-R results from this agreement. The order of dismissal in the 1983 tax case was therefore premature, and the Court accordingly grants the Plaintiff's motion to the extent that the order of dismissal in No. CIV-83-2165-R is vacated.

There can be little doubt that the Plaintiff intends to appeal the Court's dismissal of the 1982 tax case upon receipt of this Order. Indeed, the Court prefers that its decision be examined on appeal before further proceedings are had in the 1983 tax case. Accordingly, the Plaintiff's Motion for Consolidation of the two cases is denied, and No. CIV-83-2165-R is stayed pending appeal of No. CIV-83-419-R. For the duration of the stay No. CIV-83-2165-R shall be administratively closed, to be reopened upon final disposition of No. CIV-83-419-R.

In summary, the Court reaches the following conclusions:

1. The Plaintiff's Motion For New Trial, Or In The Alternative, For Vacation, Amendment, Or Alteration of Judgment is denied to the extent that it challenges dismissal of No. CIV-83-419-R.
2. The Plaintiff's Motion For New Trial, Or In the Alternative, For Vacation, Amendment, Or Alteration, of Judgment is granted to the extent that it challenges dismissal in No. CIV-83-2165-R.
3. The order of dismissal in No. CIV-83-2165-R is vacated.

4. The Plaintiff's Motion for Consolidation is denied.
5. Case No. CIV-83-2165-R is stayed and administratively closed pending appeal of the Court's decision in Case No. CIV-83-419-R.

The parties are directed to keep the Court apprised of the appellate proceedings in No. CIV-83-419-R.

IT IS SO ORDERED this 29th day of April, 1985.

DAVID L. RUSSELL
United States District Judge